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Publications

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SESSIONAL PAPERS.

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OF THE

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SESSION 1889.

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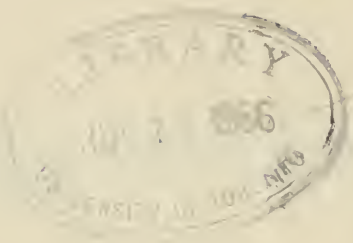

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No. 3.. Report upon the Institution for the Education and Instruction of the Deaf and Dumb, Belleville, for the year ending 30th September, 1888. (*Printed.*)

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No. 33.. Copy of Order in Council commuting the fees payable to W. A. McLean, Esquire, Local Master for the Supreme Court of Judicature for Ontario, at Walkerton. (*Printed.*)

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No. 38.. Return, shewing separately in regard to Companies doing business under Ontario charters, the amount of fire insurance at risk on the 31st December for each of the years from 1881 to 1887, both inclusive; the number of policies in force on the 31st December in each year of which there is a correct record; the total amount of losses paid each year, and the total amount of expenses during each year; the percentage of losses and expenses; the cost of expense on every $1,000 at risk in purely mutual, mixed mutual, cash and stock companies. (*Printed.*)

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No. 46.. Correspondence relative to the Accounts between the Provinces of Ontario and Quebec and the Dominion of Canada. (*Printed.*)

No. 47.. Return shewing the estimated cost, if any, and actual cost *per* yard for each drain constructed by or under the Government within the Counties of Lambton, Kent, Elgin and Essex, and the name of the engineer or other person employed by the Ontario Government to make such estimate. The price *per* yard at which the work was let, and whether on tender by public advertisement or otherwise. The salaries or other remuneration paid the engineers or other persons employed by the Ontario Government to superintend the construction of the said drainage works, and charged to the said works respectively. *Part of No. 8* (*Printed.*)

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No. 57.. Statement of Receipts and Expenditures on account of the Mercer Estate, for the year 1888. (*Printed.*)

No. 58.. Return, shewing a list of all Text Books for each of the last five years, the use of one or more of which was compulsory on pupils—first, in the High Schools, secondly, in the Public Schools, and third, in the Separate Schools. (*Printed.*)

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No. 61.. Return, shewing the location of any Houses of Industry, Poor Houses, or similar institutions, for the care and maintenance of indigent persons, now established in any of the cities, towns and counties, in the Province of Ontario, at the total or partial cost of any Municipality, and distinguishing those partly and those wholly supported by such Municipality; the number of inmates permanently or temporarily lodged in each such institution during the years 1887 and 1888, and their age and sex, with a classification of the supposed causes of pauperism, and the length of detention of such inmates, where any have been committed for short periods; the dietary used in these institutions; the amount expended upon the erection and improvement of buildings since the establishment of any such institution, and the cost of lands connected therewith; the extent, if any, of land annually under cultivation, and the money value of returns therefrom during the years named; the annual money value, if any, of the products of the labour of the inmates; the *per capita* daily or annual cost of actual maintenance, during 1887 and 1888, of the inmates of such institution, less interest on invested capital, and plus the salaries of officials; the number and salaries of attendants, surgeons, and other officials; the number of inmates of such institutions in each of the years named, regarded as imbecile, idiotics, or insane, and of the blind, epileptic or deaf and dumb; and the number of committals of inmates of any such institution to cells or other solitary confinement, as punishment, in 1887 and 1888, and the period during which they were so held in confinement. (*Printed.*)

No. 62.. Return, shewing the number of persons who have visited the Queen Victoria Niagara Falls Park during the year 1888. Also, shewing the number who have paid for admission to the islands in the Park, giving the amount of revenue derived from that source. Also, shewing the amount of revenue derived from all other sources during the year; also, the amount paid as expenses for the management of the Park, giving the names of the officials and the amount paid to each. Also, giving a statement of the money still on hand derived from the sale of bonds, and shewing the amount of interest paid and from what source paid; so far as the particulars do not appear in the Report of the Commissioners. (*Printed.*)

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No. 65.. Copy of an Order in Council, approved the 18th March, 1889, respecting the sum to be paid to Mr. S. Malcolmson, as Deputy Registrar of the Chancery Division of the High Court of Justice, and appointing him to that office in the room and stead of Henry McDermott, deceased. (*Printed.*)

No. 66.. Return, shewing the amount paid by the Province and the rates charged *per* thousand gallons by the City of Toronto during each of the past five years for water supplied to the Public Institutions and Departmental Buildings, and offices of this Province located in the City. (*Not printed.*)

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No. 73.. The Bursar's Statement of the cash transactions of the University of Toronto for the year ending 30th June, 1888. (*Printed.*)

No. 74.. Report of the Bureau of Industries on the Municipal Statistics of Ontario, for the years 1886 and 1887. (*Printed.*)

No. 75.. Copies of all correspondence between the University of Toronto and any other University or Universities, relating to Matriculation Examinations. (*Not printed.*)

No. 76.. Report of the Provincial Board of Health, for the year 1888. (*Printed.*)

No. 77.. Return shewing the amount paid out from municipal funds, either by direct grants or remission of taxes, in each city, town, village or rural municipality in the Province of Ontario, during 1887 or 1888, for the relief of poor and indigent persons, but not including any sum paid for the support of a House of Industry or similar institution; the number of indigents a permanent charge upon any municipality in 1887 and 1888; and the number of such indigents who received temporary aid from municipal funds in 1887 and 1888. (*Printed.*)

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THE PROCEEDINGS

BEFORE THE JUDICIAL COMMITTEE OF HER MAJESTY'S

IMPERIAL PRIVY COUNCIL

ON THE SPECIAL CASE RESPECTING THE WESTERLY

BOUNDARY OF ONTARIO,

ARGUED 15th, 16th, 17th, 19th, 21st and 22nd JULY, 1884.

WITH NOTES OF EXPLANATION AND CORRECTION.

PRINTED BY ORDER OF THE LEGISLATIVE ASSEMBLY.

TORONTO:
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1889.

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BEFORE HER MAJESTY'S IMPERIAL PRIVY COUNCIL ON THE

SPECIAL CASE

RESPECTING THE

WESTERLY BOUNDARY OF THE PROVINCE OF ONTARIO.

IN THE PRIVY COUNCIL.

IN THE MATTER OF THE BOUNDARY BETWEEN THE PROVINCES OF ONTARIO AND MANITOBA, IN THE DOMINION OF CANADA.

BETWEEN THE PROVINCE OF ONTARIO, OF THE ONE PART,

AND

THE PROVINCE OF MANITOBA, OF THE OTHER PART.

SPECIAL CASE

Referred to the Judicial Committee of Her Majesty's Imperial Privy Council.

The Province of Ontario claims that the westerly boundary of that province is either (1) the meridian of the most north-westerly angle of Lake of the Woods, as described in a certain Award* made on the 3rd August, 1878, by the Honourable Chief Justice Harrison, Sir Edward Thornton and Sir Francis Hincks, or (2) is a line west of that point.

The Province of Manitoba claims that the boundary between that province and the Province of Ontario is (1) the meridian of the confluence of the Ohio and Mississippi Rivers, or (2) is that portion of the height of land, dividing the waters which flow into Hudson's Bay from those which empty into the valley of the Great Lakes, and lying to the west of the said meridian line.†

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* For the text of the Award, see appendix A, hereto.

† The Act of Manitoba, 44 Vict., cap. 1, (1881), and the Dominion Act, 44 Vict., cap. 14, (1881), provide that the easterly boundary of the Province of Manitoba, shall be "a line drawn due north from where the westerly boundary of the Province of Ontario intersects the international boundary line dividing Canada from the United States of America." The alternative claim of Manitoba, to the irregular and sinuous line of the height of land, is not, it will be observed, in consonance with the due north line provided for by the Acts. The reference of the Case, however, as agreed upon on behalf of the two provincial governments, to the Judicial Committee, was concurred in and recommended by the Dominion Government, by Order in Council, of 6th May, 1888; under which also that Government expressed "their readiness to be bound by the decision of the Judicial Committee." (Joint App., p. 6.)

It has been agreed to refer the matter to the Judicial Committee of Her Majesty's Privy Council, and an Appendix has been prepared containing the materials agreed to be submitted with this Case for the adjudication of the dispute. Each and every of the particulars in the said Appendix is submitted *quantum valeat* and not otherwise.

In addition to the particulars set forth in the Appendix, any historical or other matter may be adduced which in the opinion of either party may be of importance to the contention of such party; and (subject to any rule or direction of the Judicial Committee in that behalf) such additional matter is to be printed as a Separate Appendix by the party adducing the same; and copies are to be furnished at least ten days before the argument.

The book known as the Book of Arbitration Documents may be referred to in the argument for the purpose of shewing, in part, what materials were before the Arbitrators.*

It is agreed that in the discussion before the Judicial Committee of the Privy Council reference may be made to any evidence of which judicial notice may be taken, or which (having regard to the nature of the case and the parties to it) the Privy Council may think material and proper to be considered, whether the same is or is not contained in the printed papers.

The questions submitted to the Privy Council are the following:

(1) Whether the Award is or is not, under all the circumstances, binding.

(2) In case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said provinces.

(3) Whether, in case legislation is needed to make the decision on this Case binding or effectual, Acts passed by the Parliament of Canada and the Provincial Legislatures of Ontario and Manitoba, in connection with the Imperial Act, 34-5 Vict., cap. 28, or otherwise, will be sufficient, or whether a new Imperial Act for the purpose will be necessary.

O. Mowat,
Attorney-General of Ontario.

James A. Miller,
Attorney-General of Manitoba.

* The Book of Arbitration Documents, printed under the title "Statutes, Documents and Papers bearing on the Discussion respecting the Northern and Western Boundaries of the Province of Ontario, including the principal evidence supposed to be either for or against the claims of the Province. Compiled by direction of the Government of Ontario; with explanatory Notes,"—is also printed in Sess. Papers, Ont., 1879, No. 31.

The Cases submitted to the Arbitrators on the part of the Province and the Dominion respectively, together with a report of the argument of counsel on that occasion, as well as the correspondence and papers relating to the boundaries, of dates from 1856 to 1882, will be found in Sess. Papers, Ont., 1882, No. 69.

THE ARGUMENT.

COUNCIL CHAMBER, WHITEHALL,
TUESDAY, July 15th, 1884.

Present:

The Right Honourable The LORD CHANCELLOR,
The Right Honourable The LORD PRESIDENT,
The Right Honourable Lord ABERDARE,
The Right Honourable Sir BARNES PEACOCK,
The Right Honourable Sir MONTAGUE E. SMITH,
The Right Honourable Sir ROBERT P. COLLIER.

Counsel for Ontario:—Mr. MOWAT, Q.C., *Attorney-General for Ontario*, Mr. SCOBLE, Q.C., Mr. MILLS, and Mr. HALDANE.

Counsel for Manitoba:—Mr. J. A. MILLER, Q.C., *Attorney-General for Manitoba*, and Mr. D. MCCARTHY, Q.C.

Counsel for the Dominion Government:—Mr. CHRISTOPHER ROBINSON, Q.C., and Mr. HUGH MACMAHON, Q.C.

Mr. MOWAT.—My Lords, I appear in this case for the Province of Ontario.

Mr. MCCARTHY.—I do not know whether your Lordships have considered who has the right to begin in this case. I appear for the Province of Manitoba.

The LORD CHANCELLOR.—Substantially, the first question submitted is whether a certain Award is or is not, under all the circumstances, binding. Who denies its validity?

Mr. MOWAT.—The Province of Manitoba.

The LORD CHANCELLOR.—You affirm its validity?

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—I suppose you would say it, *prima facie*, is binding?

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—If so, would not it bear upon the person who disputes its validity to begin?

Mr. MOWAT.—If your Lordships think right.

The LORD CHANCELLOR.—Of course, if both of you agreed it was not binding that would be a different thing.

Mr. MCCARTHY.—May it please your Lordships, the first matter probably in order is as to the validity of the award. I would just state, as shortly as I can, the history of the case, and the circumstances under which the reference was made to arbitration, and the award was afterwards made by the arbitrators. In 1867, the Confederation Act was passed, by which the then Province of Canada was brought into the Dominion, and became part of the Dominion, as the Province of Ontario as to one part, and the Province of Quebec as to the other. The Provinces of New Brunswick and Nova Scotia were also made a part

of the Dominion, and provision was made by the British North America Act for bringing in at a subsequent date the Province of Prince Edward Island, the Province of British Columbia, and what was known as Rupert's Land and the North-Western Territory. These provinces or colonies were to be brought in, and to become a part of Canada as confederated, upon the joint petition of both Houses of the Canadian Parliament, and subject to the sanction of Her Majesty in Council. Immediately after 1867, an agitation sprung up in Canada—in point of fact it is wrong to say it sprung up in Canada, because it had been initiated before confederation—with a view of doing away with the right of the Hudson's Bay Company, who claimed to be the owners—and I suppose in point of fact were the owners—of what is known as Rupert's Land. A controversy was entered into on behalf of the Canadian government, continuing the controversy that had been initiated before confederation, in which it was attempted to be shewn that the charter to the Hudson's Bay Company, which was made, as perhaps your Lordships will remember, as early as 1670, was invalid, and at all events disputing the geographical limit which the Hudson's Bay Company claimed for the territory granted to them by that charter. Then the Rupert's Land Act was passed in 1868. By that Act provision was made for settling the dispute between the Hudson's Bay Company and Canada, so to speak. An arrangement was provided by which the Hudson's Bay Company's claims could be settled, and on their settlement it was arranged and provided that Rupert's Land should, upon the joint address of both Houses of the Canadian Parliament, be added to the Dominion. That was done in the year 1870. Shortly after that, the Province of Ontario set up—or desired at all events, that the boundary upon the west, which had been in dispute I may say since 1818, if not earlier—that the boundary of Ontario extended to the point, and perhaps beyond the point, which the arbitrators have since determined as being the limit of Ontario on the west. The Dominion denied that. The Dominion asserted that the Rupert's Land Act settled the question, and defined the boundaries of Rupert's Land for the purposes of confederation; and that whether that Act did or did not settle and determine that question, at all events it was determined by the Quebec Act of 1774, by which the limits of the Province of Quebec were fixed. That province afterwards was divided into two provinces, called Upper and Lower Canada, in 1791. In 1840, these two Provinces of Upper and Lower Canada were again united and became the Province of Canada, to be disunited at the time of confederation, and to be the Provinces of Ontario and Quebec. Thereupon, by certain Orders in Council of the Dominion of Canada on the one side, and of the Province of Ontario on the other, it was proposed to refer the question of the dispute as to the boundaries to the award of two gentlemen, who were named, and who were to have power to select a third.

Sir Robert Collier.—At this time had Manitoba been taken into the confederation?

Mr. McCarthy.—Manitoba was carved out of the new territory.

Sir Robert Collier.—You said it was provided that it should be taken into the confederation on the address of the two Houses—had the address of the two Houses been presented?

Mr. McCarthy.—It was to be taken in, but not as Manitoba. Rupert's Land is a much larger country than Manitoba.

Sir Robert Collier.—That is my question, whether the address had been actually presented?

Mr. McCarthy.—Yes; that was in 1870, and it was in 1874, after these differences had arisen between the Dominion and the Province of Ontario, that Orders were made referring the point. What the Dominion contends for is this—the Dominion says the award is not binding.

The LORD CHANCELLOR.—I thought you said you appeared for Manitoba?

Mr. MCCARTHY.—I should have explained. Manitoba, as originally formed, did not come as far east as it does now. It did not touch the Province of Ontario, as the Dominion claims the Province of Ontario is. There was a considerable space, some 200 or 300 miles, between the western part of Ontario and the eastern part of Manitoba, as Manitoba was formed. In 1880, Manitoba was enlarged so that the eastern boundary of Manitoba goes to the western boundary of Ontario.

Sir ROBERT COLLIER.—When was it first called Manitoba in Acts of Parliament?

Mr. MCCARTHY.—When it was created, in 1870.

Sir ROBERT COLLIER.—You said it was called Rupert's Land in the Act of 1870?

Mr. MCCARTHY.—The whole territory belonging to the Hudsons' Bay Company was called Rupert's Land.

Sir MONTAGUE SMITH.—First of all, Rupert's Land annexed to the Dominion, and then Manitoba carved out of it.*

Mr. MCCARTHY.—Yes. Manitoba, as originally constructed, was west of the most north-westerly angle of the Lake of the Woods, which is the determining point. It was west of that as originally constructed, and did not approach on the eastward what Manitoba now claims to be the western boundary of Ontario. In 1880 Manitoba was enlarged, and the boundary given to Manitoba by the enlarging statute was that Manitoba upon the east should meet Ontario. Therefore the question now becomes between these two provinces, Ontario and Manitoba, although the question, as it was originally fought, was between the Dominion and Ontario.

Sir MONTAGUE SMITH.—When Orders in Council were made referring it, had Manitoba been enlarged?

Mr. MCCARTHY.—No. It was after the award was made that Manitoba was enlarged and came to the western limit of Ontario.

The LORD CHANCELLOR.—Which boundary line does the question relate to?

Mr. MCCARTHY.—The boundary line between Manitoba and Ontario—that is the western limit of Ontario and the eastern limit of Manitoba.

The LORD CHANCELLOR.—Then at the time the award was made, Manitoba had no interest in that question?

Mr. MCCARTHY.—No.

The LORD CHANCELLOR.—But the Dominion had?

Mr. MCCARTHY.—The Dominion had. Perhaps if your Lordships will look at one of these maps it will assist you [*producing map*].† All this that is marked in blue is what is claimed as Rupert's Land. This is Hudson's Bay, and this is what is claimed as being Rupert's Land. The boundary on this side is the Hudson's Bay, and it was bounded on the south by the Province of Ontario.

Lord ABERDARE.—That is, in fact, what was English territory at the time that the French held Canada?

*First, Rupert's Land and the North-Western Territory, so-called, admitted into the Dominion, without specification of boundaries of either, and named the North-West Territories, and then Manitoba carved out of the same, not out of Rupert's Land alone. (See Imp. Order in Council of 23rd June, 1870, prefixed to Stats. of Can., 1872, p. lxiii; and the Dom. Acts, 32 and 33 Vict., cap. 3, 1869, and 33 Vict., cap. 3, 1870.) Sec. 1 of the last mentioned Act describes the southern boundary of the new Province as running from 96° W. long., on the paralell of 49°, "due west along the said parallel of 49° north latitude (which forms a portion of the boundary line between the United States of America and the said North-Western Territory) to the meridian of 99° west longitude." This is, in effect, a legislative declaration of the Dominion that Rupert's Land did not extend to the international boundary.

†Namely, the map shewing the territories claimed by the Hudson's Bay Company, under their charter, appended to the Report of the Committee of the Imp. House of Commons on the H. B. Co,, 1857.

Mr. McCarthy.—That will be a good deal in dispute here. My learned friends on the other side contend for the French view of the case; we are contending for the English view of the case, and the dispute was between France and England as to the Hudson's Bay rights.

Sir Montague Smith.—That, I suppose, was fought out before the arbitrators.

Mr. McCarthy.—It was, and it is again before your Lordships.

The Lord Chancellor.—I have a map,* which may not perhaps be exactly the same as yours. Here is a square block which is coloured yellow, and within which there is a smaller block with an orange margin on which Manitoba is marked.

Mr. McCarthy.—That was the original Manitoba, the small block.

The Lord Chancellor.—Then comes a block to the east, with two lakes in it, Lake St. Joseph and another lake.

Lord Aberdare.—What was done with the territory north of that which was assigned to Manitoba, between Manitoba and Hudson's Bay?

Mr. McCarthy.—Your Lordships see it on Johnston's map;† it shews that very plainly. The Manitoba shewn there is the enlarged Manitoba.

Sir Montague Smith.—According to what boundaries is Manitoba shewn here?

Mr. McCarthy.—According to my claim—the Manitoba claim.

Lord Aberdare.—Did the award line carry the Ontario province up to the Lake of the Woods?

Mr. McCarthy.—Yes, to the most north-westerly angle of the Lake of the Woods.

Lord Aberdare.—Then, the Dominion, under its assumed power of re-opening the question, assigned to Manitoba a considerable tract of country beyond that which was given by the award of the arbitrators.

Mr. McCarthy.—That is to say, if the Dominion view was right. They did not actually set it out by metes and bounds; they merely said, Manitoba on the east shall be where Ontario on the west ends. They left that point to be determined.

Lord Aberdare.—The Dominion drew no line as to the east?

Mr. McCarthy.—No. They had originally drawn a line as to the east, but they did not draw a line to the east as regards that.

The Lord Chancellor.—I understand you to admit that the disputed district was not within the limit of Manitoba until the year 1880?

Mr. McCarthy.—Yes.

The Lord Chancellor.—That at that time, according to your view, it was within the Dominion and not within Ontario?

Mr. McCarthy.—That is so.

Sir Robert Collier.—Where was the line of the award?

Mr. McCarthy.—The most north-westerly angle of the Lake of the Woods. [*The learned counsel explained upon the map.*]

Sir Montague Smith.—What does this boundary mean [*pointing to a line on the map*]?

Mr. McCarthy.—That is the original Manitoba. We claim now to *this*, and the arbitrators have given this line. [*He shews these on the map*]. They have taken the most north-westerly angle of the Lake of the Woods, and then followed down *here* [*pointing*].

Sir Montague Smith.—What do you claim as belonging to Manitoba?

Mr. McCarthy.—We claim this line here [*pointing*].

* The Ontario Government map, prepared for this reference, by Stanford, 1884, and the main features of which have been re-produced in the map accompanying this volume.

† Johnston's map of the Dominion.

Sir MONTAGUE SMITH.—This bit which is coloured.

Mr. MCCARTHY.—This would be the District of Keewatin: it was originally Keewatin. It would now be Manitoba. The tract in dispute really goes from *that* line to this. That part Ontario is not claiming, and did not claim by the award.

Sir MONTAGUE SMITH.—Then this dotted line is the award line, is it?

Mr. MCCARTHY.—No. It is the water line—the English River and Albany River line—that is the award line.

Now it may be as well perhaps at this moment to point out the heights of land, because these will have a good deal to do with the discussion which we are about entering upon. This is the northern height of land, which forms the line of the watershed between Hudson's Bay and the St. Lawrence system. It goes round Lake Superior. This map* shews all the heights of land. And this is another so-called height of land in this direction,† which was at one time claimed to be the limit of the Hudson's Bay territory. This then is the other watershed line which marks the limits of the basin that drains into Hudson's Bay. The basin of Hudson's Bay was drained by the Albany River, the Churchill River and the Nelson River. Then, when you go west of that, the Mackenzie River goes into the Arctic Ocean; and then the St. Lawrence system takes its rise here, and falls into those large lakes—Lake Superior and so on—and rolls away to the Gulf of St. Lawrence. That is the St. Lawrence system. Then, below that, there is the Mississippi system. Those are important natural landmarks to be borne in mind, because they were referred to continually in disputes which arose between the English and French at the earliest times.

Now your Lordships will see the effect of the award was to completely ignore the right of the Hudson's Bay Company to any territory whatever.

Sir ROBERT COLLIER.—We had better see what the award is.

The LORD CHANCELLOR.—We had better first see under what authority the award was made, and what the award is.

Mr. MCCARTHY.—I will just point that out to your Lordships before I come to the contentions we make upon it. In the Joint Appendix, page 7, your Lordships will see how the matter was referred. Mr Crooks, who was then a member of the Government of Ontario, reports to the executive of that Province, in the document which is set out on page 7,‡ reciting the Acts of Parliament, and going on down to about line 20, where the important matter comes in:

"In view of these objects the undersigned, before his late visit to Ottawa on other public business, was authorized by the other members of Your Excellency's Council to propose (subject to Your Excellency's approval) to the Government of the Dominion, that the question concerning the northern and western boundaries of the Province of Ontario should be determined by a reference to arbitrators to be mutually agreed upon, and whose standing and ability might readily be expected to secure for their decision the confidence alike of the people of Ontario and the people of the Dominion. Your Excellency's Council were of opinion that a decision by such arbitrators is likely to be more prompt, and perhaps more satisfactory, than any other mode of decision which is attainable. The undersigned was also authorized to suggest the name of the Honourable William Buell Richards, Chief Justice of Ontario, as one of the arbitrators, subject to your Excellency's approval. Accordingly the undersigned, while at Ottawa, conferred with the Premier and other members of the Dominion government on the subject of the said matters, and made the above suggestions to them. The government of the Dominion concurred in the

* Johnston's Physical Map.

† The height of land dividing the waters that pass through Lake Winnipeg from the north from those that fall direct into Hudson's Bay.

‡ Hon. Adam Crooks to the Lieutenant-Governor, 10th Nov., 1874, Sess. Papers, Ont., 1875-6, No. 14, p. 14.

views expressed on the part of the Government of Ontario, and proposed on behalf of the Dominion the name of the Honourable Lemuel Allan Wilmot, late Lieutenant-Governor of New Brunswick, to act in conjunction with the said Chief Justice, and that authority be given to the said the Hon. William Buell Richards and the Hon. Lemuel Allan Wilmot to agree upon a third person to be associated with them, such third person not being a resident of Canada, and that the determination of a majority of such referees should be final and conclusive upon the limits to be taken as and for such boundaries as aforesaid respectively. The undersigned recommends that the Province agree to concurrent action with the Dominion"—I draw attention to that particularly—" in obtaining such legislation as may be necessary for giving binding effect to the conclusion which may be arrived at, and for establishing the northern and western boundaries of the Province of Ontario in accordance therewith."

The LORD CHANCELLOR.—That is in 1874.

Mr. MCCARTHY.—In November, 1874. Then, on page 8, there is the formal Order of Committee of Council of the Province of Ontario acceding to Mr. Crooks' view,* and following that is the report of a Committee of the Privy Council of Canada :†

" On a memorandum, dated the 12th November, 1874, from the Hon. Mr. Mackenzie, stating that he recommends concurrence in the proposition of the Government of Ontario to determine, by means of a reference, the northern and western boundaries of that province relatively to the rest of the Dominion ; that the Ontario government having name the Hon. William Buell Richards, Chief Justice of Ontario, as one of the referees, he submits the name of the Hon. Lemuel Allan Wilmot, formerly Lieutenant-Governor of the Province of New Brunswick, to act in conjunction with him, and advises that authority be given them to agree upon a third person, not being a resident of Canada—"‡

Following the words I have already read :

" He further recommends that the Dominion agree to concurrent action with the Province of Ontario in obtaining such legislation as may be necessary for giving binding effect to the conclusions arrived at, and for establishing the northern and western limits of the Province of Ontario in accordance therewith."

That was the minute of council, and I fancy from the next document which appears in the case that that was confirmed by the Governor-General. It says : " Approved by the Governor-General." Then : " I am directed to transmit to you, for the information of your Government,—" that was from Ottawa to Toronto—the information that an Order has been passed naming the gentleman who has been appointed arbitrator for the Dominion. Then, on the 21st November, the Under-Secretary of State for Canada writes to Mr. Wilmot § informing him of his appointment, and at the top of page 9, your Lordships will see what he informs Mr. Wilmot was the matter remitted to him :

" His Excellency the Governor-General in Council has been pleased, at the instance of the Government of the Province of Ontario, to direct that the question of the northern and western boundaries of that Province relatively to the rest of the Dominion, be determined by means of three referees, of whom one is to be named by the Government of the Dominion, and one by the Government of Ontario, these two to have authority to agree upon a third, not being a resident of Canada—"

and so on. Then at line 10 :

" I am to add that the Dominion government agree to concurrent action with the Province of Ontario in obtaining such legislation as may be necessary for giving effect to the

* Order in Council, 25th Nov., 1874. Sess. Papers, Ont., 1875-6, No. 14. p. 14.

† Order in Council (Can.), 12th Nov., 1874. *Ib.*

‡ Here comes in, in the original, the concluding portion of the sentence :—" and that the determination of a majority of such three referees be final and conclusive upon the limits to be taken as and for such boundaries respectively."

§ Sess. Papers, Ont., 1882, No. 69, p. 248.

conclusions arrived at, and for establishing the northern and western limits of the Province of Ontario in accordance therewith."

Nothing, I think, happens now until at the foot of the page your Lordships will find the Act passed in Ontario in 1874.* It recites :

"Whereas by chapter twenty-eight of the Acts of the Parliament of the United Kingdom of Great Britain and Ireland, passed in the session held in the thirty-fourth and thirty-fifth years of Her Majesty's reign, and intituled 'An Act respecting the establishment of Provinces in the Dominion of Canada,' it is enacted that the Parliament of Canada may, from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such province, upon such terms and conditions as may be agreed to by the said legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase, or diminution, or alteration of territory in relation to any province affected thereby—"

apparently shewing that the arbitrators were appointed to fix a boundary which both the legislative bodies were afterwards to sanction, whether it increased, or decreased, or altered the true and proper line of the western boundary of the Province :

"And whereas the northerly and westerly boundaries of the Province of Ontario have never been determined ; And whereas, subject to the approval of the Parliament of Canada and the Legislature of Ontario, it has been agreed by the Governments of the Dominion of Canada and the Province of Ontario—"

and it goes on to set out the agreement, which I need not read. Then, the first clause of the Act is :

"The Legislature of the Province of Ontario consents that the Parliament of Canada may declare that the boundaries which, by the award of the arbitrators aforesaid, or of any two of the arbitrators aforesaid, may be decided to be the northerly and westerly boundaries respectively of this Province, shall be declared to be the northerly and westerly boundaries thereof, or, in case the award shall be as to the westerly boundary alone, the same may be in like manner declared by the Parliament of Canada as aforesaid, and that the Parliament of Canada may thereby increase, diminish, or otherwise alter the northerly or westerly limits of the Province of Ontario so that the same may be in accordance with the award."

Then, there is provision made for the death or resignation of the arbitrator, which is not important. This Act was not to come into effect until proclaimed, and as a matter of fact it never was proclaimed, because the Dominion government and the Dominion parliament never passed a corresponding Act. Although they had agreed, as your Lordships will see by the Orders in Council to which I have already referred, to concurrent legislation which would give effect to the decision or opinion of the arbitrators—and that in point of fact was the basis of the whole proceeding, the whole reference to arbitration—yet the Dominion parliament were never called upon by the government and never did pass an Act. So that the Province of Ontario, although it passed this Act, stipulated in the last clause that it was not to come into effect until the Lieutenant-Governor in Council should issue his proclamation ; and he never did issue his proclamation, because the other parliament had not passed the concurrent legislation which had been agreed to.

The Lord Chancellor.—The legislation of Canada was to be an effective and practical legislation, but it only could take place with the consent of the provincial legislature.

* 38 Vict., cap. 6, "An Act respecting the Northerly and Westerly Boundaries of the Province of Ontario."

Mr. McCarthy.—Yes; that is in pursuance of the statute of 1871.* Then from 1874 until 1878, nothing appears to have been done, but in July, 1878, an Order in Council is passed by Ontario† which your Lordships will find at the foot of page 10, which recites, upon the report of the Attorney-General, that Chief Justice Harrison had been appointed in lieu of Chief Justice Richards. Chief Justice Richards had become the Chief Justice of the Supreme Court of Canada, and then he resigned his position of arbitrator for Ontario, and Chief Justice Harrison became arbitrator in his place. It also recited the fact that Mr. Wilmot had died in the interim, and suggested that Sir Francis Hincks should be appointed as arbitrator for the Government of the Dominion, and Sir Edward Thornton, the ambassador at Washington, as the third arbitrator—to that extent departing from the original terms of the agreement, which were that the two arbitrators appointed by the respective provinces should themselves have selected the third; but nothing turns upon that. Then, it further goes on at the foot of the page:

"And also that the Province of Ontario agree to concurrent action with the Government of the Dominion in obtaining such legislation as might be necessary for giving effect to the conclusion arrived at by the said arbitrators, and for establishing the northern and western limits of the Province of Ontario in connection therewith."

That, your Lordships will see, is dated the 31st day of July.

Sir Robert Collier.—The Committee of Council advised the foregoing.

Mr. McCarthy.—Yes; that is on the 31st July, 1878. On the same day, at Ottawa, the Privy Council of Canada adopt a corresponding Order, which is set out on page 11.‡ The arbitrators thereupon proceeded to hear the matter, and on the 3rd August the award was made.

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* Imp. Act, 34 and 35 Vict., cap. 28.

† Order in Council (Ontario), Approved by the Lieutenant-Governor, the 31st day of July, 1878.

Upon consideration of the report of the Honourable the Attorney-General, dated 30th day of July, 1878, recommending that the Honourable Robert A. Harrison, Chief Justice of Ontario, be appointed arbitrator in the matter of the northerly and westerly boundaries of the Province of Ontario in relation to the rest of the Dominion, in the room and stead of the Honourable William Buell Richards, who, since his appointment as such arbitrator, was appointed Chief Justice of the Supreme Court, and subsequently resigned his appointment as arbitrator, the Government of the Dominion having named Sir Francis Hincks one of the arbitrators in the room and stead of the Honourable Lemuel Allan Wilmot, deceased, and the Right Honourable Sir Edward Thornton having been named on behalf of the Governments of the Dominion and Ontario; and also recommending that the determination of the award of such three arbitrators, or a majority of them, in the matter of the said boundaries respectively, be taken as final and conclusive; and also that the Province of Ontario agree to concurrent action with the Government of the Dominion in obtaining such legislation as might be necessary for giving effect to the conclusion arrived at by the said arbitrators, and for establishing the northern and western limits of the Province of Ontario in connection therewith:

The Committee of Council advise that the foregoing recommendations be adopted and approved of by Your Honour.

Certified,

J. Lonsdale Capréol,
Assistant Clerk, Executive Council, Ontario.

‡ Report of a Committee of the Privy Council (Canada), Approved by the Governor-General on the 31st July, 1878.

The Committee of Council have had under consideration the subject of the northern and western boundaries of the Province of Ontario, which, under previous Orders in Council, had been referred to the Honourable W. B. Richards, then Chief Justice of Ontario, named as referee on behalf of that Province, but who was subsequently replaced by the present Chief Justice, the Honourable R. A. Harrison, and the Honourable Sir Francis Hincks, who has been named on behalf of the Dominion; and whereas subsequently to the action taken under Order of Council of 12th November, 1874, it was mutually agreed between the Governments of the Dominion and Ontario, that the Right Honourable Sir Edward Thornton should be selected as third referee, the Committee recommend that such selection be confirmed by Minute of Council, and that the determination of such three referees be final and conclusive upon the limits to be taken as and for each boundary respectively.

Certified,

W. A. Himsworth,
Clerk, Privy Council, Canada.

Now, your Lordships have the history of the reference, and of the award which followed upon that reference. The first point that we make is this: We say, as a matter of fact, all these papers shew that it never was intended that the award should be binding or effective until concurred in by both legislative bodies.

The LORD CHANCELLOR.—Was it possible?

Mr. MCCARTHY.—We say not. We say it was not possible as a matter of law, and we say as a matter of fact it was never contemplated that it should be effective until concurred in by both legislatures.

I will, in pursuance of this branch of the proposition, point out the different passages which, I think, establish the fact for which I contend, in addition to those to which I have already referred. The intermediate pages merely state the case for the respective parties and the argument before the arbitrators, to which I think I need not refer at present. Then we come to page 108, following the award. The Province of Ontario, by an Act passed in 1879*—the succeeding session of Parliament—recites:

"Whereas the northerly and westerly boundaries of the Province of Ontario were not determined until lately; And whereas, pending the determination thereof, certain provisional lines, which for certain purposes were to be regarded as such boundary lines, were agreed to by the Governments of the Dominion and the Province;—"

I may just explain that, pending this dispute, and in order that the timber might be guarded and regulated, a provisional line was agreed to between the parties, separating the disputed territory. To the east of the line the Province of Ontario managed the timber, and to the west of the line the Dominion managed it:

"And whereas it was agreed by the Governments of the Dominion of Canada and the Province of Ontario that the true boundaries should be determined by reference to arbitration; And whereas one of the arbitrators named in the Revised Statutes of Ontario, chapter 4, died—"

Then it goes on to recite that. Then it sets out the award. At page 109, it says:

"And whereas the effect of the said award is to give to this Province less territory than had been claimed on behalf of the Province, and more territory than the Government of Canada had contended to be within the limits of the Province, or than was contained within the provisional boundary lines aforesaid—"

Then it again refers to the Imperial Act passed in 1871, which gives the Parliament of Canada power to alter the boundaries with the consent of the legislature of any province.

Sir ROBERT COLLIER.—It recites:

"And whereas it is proper that the boundaries determined by the said award be adopted and confirmed."

Mr. MCCARTHY.—Yes; and then the enacting clause is:

"The Legislature of the Province of Ontario consents that the Parliament of Canada may declare that the boundaries which, by the award of the arbitrators aforesaid, were decided to be the northerly and westerly boundaries respectively of this Province, shall be and are the northerly and westerly boundaries thereof, whether the same increase, diminish or otherwise alter the true northerly and westerly limits of this Province."

The Parliament of Canada never did confirm these boundaries. I was proposing to refer to what I think without doubt indicates that the intention was, speaking now of it as a matter of fact, that, unless parliament did confirm the

* 42 Vict., cap. 2, "An Act respecting the Northerly and Westerly Boundaries of Ontario."

boundaries, the award should not be operative. The following document, at page 109, is a lecture delivered by Sir Francis Hincks, explanatory of the award.*

The LORD CHANCELLOR.—I think that can hardly be evidence of anything, can it?

Mr. MCCARTHY.—There is a good deal, I am afraid, in this Joint Appendix which is not evidence of anything.

The LORD CHANCELLOR.—The opinion of an individual, though he was one of the arbitrators, can neither interpret the award nor settle the question independently.

Mr. MCCARTHY.—It was thought perhaps to be useful in this way: Sir Francis Hincks admitted to some extent that the award did not follow the true line—that it was to some extent a conventional boundary.†

The LORD CHANCELLOR.—It ought not to be brought in if it is not evidence. That can only be referred to without prejudice.

Mr. MCCARTHY.—Then I pass on to page 125.

Sir MONTAGUE SMITH.—You say the Dominion parliament has never confirmed it. Has it ever been asked to confirm it?

Mr. MCCARTHY.—Yes, repeatedly. I am coming to that now. At page 125, your Lordships will find that on the 31st of December, 1878, the Provincial Government in Toronto write to the Secretary of State for Canada.‡ At line 25 the Provincial Secretary says:

"I am further directed respectfully to remind the Government of Canada that the territory which was in dispute before the award was made, extends on the westerly side of Ontario from, say, the Rocky Mountains to a line drawn due north from the confluence of the Ohio and Mississippi, and extends on the northerly side from, say, the height of land to the most northerly limit of Canada; that the award assigns part of this territory to the Dominion, and part to Ontario; and that the administration of justice will continue to be surrounded with difficulties and uncertainties, especially in the matter of jurisdiction, until the award is confirmed by express legislation at Ottawa and here; and

*"The Northerly and Westerly Boundaries of the Province of Ontario, and the Award relating thereto, as discussed and explained by the Hon. Sir Francis Hincks, K.C.M.G., in his Public Lecture at the Education Department, Toronto, May 6th, 1881. Toronto: Printed by C. Blackett Robinson, 1881." This lecture may also be found in Sess. Papers, Ont., 1882, No. 69, p. 414.

† The reference is to the following paragraph of Sir Francis Hincks' lecture:

"CHARGE OF ADOPTING A CONVENIENT LINE REFUTED.

"The sole ground for the charge that they adopted a conventional or convenient boundary is, that the line connecting the north-eastern and south-western boundaries was adopted for the sake of convenience. The Arbitrators were guided in their decision solely by Acts of Parliament, Proclamations authorized by Orders in Council on the authority of Acts of Parliament, and international Treaties. They found in the Proclamation of 1791, that after reaching James' Bay, the description proceeded thus: 'Including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada.' If the critics of the award believe such language susceptible of the construction that it lays down a precise spot on the north-west as a boundary, then their charge might have some foundation, but the fact is that the language would have justified the arbitrators in extending the boundaries of Ontario very considerably. They were strongly urged by Col. Dennis, one of the permanent staff [he was Deputy Minister] of the Department of the Interior, after their decision as to the south-westerly and north-easterly boundaries became known, to connect the two points by a natural boundary; and being aware of the fact that the Albany River had been formerly suggested by the Hudson's Bay Company as a satisfactory southern boundary, they adopted it."

Towards the close of the argument, as will appear further on, the Lord Chancellor alluded to the subject as follows: "What we gathered from Sir Francis Hincks' document is this, that the arbitrators having settled certain points on the strictest principle, according to the best of their judgment, then the person who represented the Dominion said it would be convenient that those points should be connected by a good geographical boundary, and the arbitrators thought the Albany River line was proper for that purpose. Then, finding some indications in previous documents that that view of the Albany River line had been at one time entertained by the Hudson's Bay Company, it was adopted. I do not think it is for the Dominion, I must say, to complain of that. I do not mean that they are bound by it; of course they are not; but inasmuch as it was at their instance that that amount of deviation, if it was a deviation, from the ascertainment of the exact line took place, they can only blame the agent who then represented them, who asked for it."

‡ Sess. Papers, Ont., 1879, No. 80.

that the subject assumes unusual importance in view of the construction of public works within the territory, and the consequent influx of an unsettled and migratory population. His Honour the Lieutenant-Governor will be glad to learn that such legislation as may be necessary to give effect to the award will be had at Ottawa at the next session of the Parliament of Canada, as the legislation should, it is respectfully submitted, be, as nearly as possible, simultaneous and identical."

Sir ROBERT COLLIER.—That was written before the Act was passed ?

Mr. MCCARTHY.—Yes; it promises that an Act shall be passed in the Province of Ontario, and it is an appeal to the Dominion authorities to pass a concurrent Act. Then we come to page 127, when on the 23rd September, 1879, nothing having been done in the meantime by the Dominion, the Government of the Province again brings the matter to the notice of the Government at Ottawa.* At the end of the page, which is all I need refer to for this matter, for the rest is merely a repetition of what your Lordships already know, it says :

"The Government of Ontario does not doubt that the Government and Parliament of Canada will ultimately take the same view, and I have respectfully to represent that the delay in announcing the acquiescence of the Dominion authorities, and in giving full effect otherwise to the award, has been embarrassing and injurious."

Then the gentleman who wrote this goes on at great length to discuss the merits of the award, and to shew that the conclusion arrived at by the arbitrators was a proper conclusion. That, however, is beside the present question. Then at page 130, in a part of the same despatch, he says :

" In view of these considerations the Government of Ontario trusts that the Government of Canada will recognize the propriety of announcing, without further delay, their intention to submit to Parliament, next session, a Bill declaring the boundary established by the arbitrators to be the true northerly and westerly boundaries of Ontario, and to use the influence of the government to have the measure accepted by both Houses and assented to by His Excellency the Governor-General."

That met with but bare acknowledgment. No statement at that time was made by the Government at Ottawa as to the course proposed to be taken or the advice proposed to be offered to the Parliament of Canada.

Sir ROBERT COLLIER.—When did the Act of Ontario come into force ?

Mr. MCCARTHY.—At once.

Sir ROBERT COLLIER.—At what date ? It does not give the date here.

Mr. MCCARTHY.—It merely gives the year. I think nothing turns on the date.

Sir ROBERT COLLIER.—It was before this ?

Mr. MCCARTHY.—Yes, the early part of 1879.†

The LORD CHANCELLOR.—There is nothing done by the Act, except that the Parliament of Canada may legislate on the subject. If the Parliament never did legislate, of course the Act would not have any effect.

Mr. MCCARTHY.—That is what I submit. Then, following out the matter still further, your Lordship will find, at page 131, that certain resolutions were passed by the Legislative Assembly of Ontario on the 3rd March, 1880.‡ These resolutions are going over the well-beaten ground. It is again an appeal, as it were, to the Parliament of Canada to legislate, and at page 132, line 27, your Lordships will find these words :

" That this House regrets that notwithstanding the joint and concurrent action of the respective governments in the premises, and the unanimous award oft he arbitrators,

*The Assistant Provincial Secretary (Ontario) to the Secretary of State (Canada). Sess. Papers Ont., 1880, No. 46, p. 3.

† 11th March, 1879.

‡ Journals Leg. Ass. 1880, vol. 13, p. 160.

the Government of Canada has hitherto failed to recognize the validity of the said award, and that no legislation has been submitted to parliament by the Government of Canada for the purpose of confirming the said award."

Then there is a legislative declaration passed in 1880 by the Dominion parliament that the award is disputed. Your Lordships will find it in the Act, 43 Vic., cap. 36, page 133:

"Whereas certain territory on the western and northern boundary of Ontario is claimed by the Government of Ontario as being within the said province; and whereas such claim is disputed; and whereas the Parliament of Canada is desirous of making suitable provision for the administration of criminal justice within the said territory until the dispute is determined."

The award was made in 1878. These numerous appeals had been made to the Government of Canada on the part of the Government of Ontario; and in 1880 an Act is passed declaring that the award is disputed in point of fact.

The LORD CHANCELLOR.—Is there any reference to the award in that Act?

Mr. MCCARTHY.—No, except in the part I have read.

The LORD CHANCELLOR.—That does not refer to the award at all.

Mr. MCCARTHY.—Not in terms. But that was the matter then in dispute; it was to provide for the administration of criminal justice in this disputed territory pending the settlement of that dispute. Then, on the 1st February, 1881, page 134, the Attorney-General of the province again appeals to the Dominion:*

"I hope that the present session of the Dominion parliament will not be allowed to come to an end without the necessary Act being passed adopting and confirming the boundary award. If, however, we are again to be disappointed some additional legislation is absolutely required."

Then comes 44 Vict. cap. 1,† providing for the extension of the boundaries of the Province of Manitoba, and giving for the boundary of Manitoba on the east the western limit of the Province of Ontario.

*Sess. Papers, Ont., 1882, No. 23.

† ACT OF THE PROVINCE OF MANITOBA, 44 VICT., CAP. 1, SEC. 1, (1881).

An Act to Provide for the Extension of the Boundaries of the Province.

Whereas by chapter twenty-eight of the Acts of the Parliament of the United Kingdom of Great Britain and Ireland, passed in the session held in the thirty-fourth and thirty-fifth years of Her Majesty's reign, intituled "An Act respecting the establishment of Provinces in the Dominion of Canada," it is enacted that "the Parliament of Canada may, from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to the province affected thereby;" And whereas it is expedient and desirable that the boundaries of the Province of Manitoba should be increased on terms and conditions of a just character; Therefore the Legislative Assembly of Manitoba enacts as follows:

1. The Legislative Assembly of Manitoba consents that the Parliament of Canada may increase or otherwise alter the limits of the Province of Manitoba upon the terms and conditions set out in this Act, and may make provisions respecting the effect and operation of any such increase or alteration of territory; the increase or alteration of the limits of the Province to be so that the boundaries thereof shall be as follows: Commencing at the intersection of the international boundary dividing Canada from the United States of America, by the centre line of the road allowance between the twenty-ninth and thirtieth ranges of townships lying west of the first principal meridian in the system of Dominion land surveys; thence northerly, following upon the said centre line of the said road allowance as the same is or may hereafter be located, defining the said range line on the ground across townships one to forty-six,* both inclusive, to the intersection of the said centre line of the said road allowance by the centre line of the road allowance on the twelfth base line in the said system of Dominion land surveys; thence easterly along the said centre line of the road allowance on the twelfth base line, following the same to its intersection by the easterly limit of the District of Keewatin as defined by the Act 39 Victoria, chapter 21, that is to say, to a point where the said centre line of the road allowance on the twelfth base line would be intersected by a line drawn due north from where the westerly boundary of the Province of Ontario intersects the aforesaid international boundary line dividing Canada from the United States of America; thence due south, following upon the said line to the international boundary aforesaid; and thence westerly, following upon the said international boundary line dividing Canada from the United States of America, to the place of beginning."

* In the Dom Act, 44 V. c. 14 *infra*, this line is described as being drawn 'across townships one to forty-four."

The LORD CHANCELLOR.—That is headed "Act of the Province of Manitoba."

Mr. MCCARTHY.—Yes; the two must be taken together—that is the Act of Manitoba allowing the province to be enlarged, and then follows the Act of the Dominion, 44 Vict. cap. 14,* to provide for the extension of the boundaries of the Province of Manitoba. The two must be taken together.

Sir BARNES PEACOCK.—In those Acts the boundaries are defined, are they?

Mr. MCCARTHY.—No, my Lord, not at this disputed place; it just says, wherever Ontario ends Manitoba commences.

Sir MONTAGUE SMITH.—It leaves it just where it was.

Mr. MCCARTHY.—Yes. It is the third line from the bottom. The proposed westerly boundary of Manitoba is defined as:

"A line drawn due north from where the westerly boundary of the Province of Ontario intersects the aforesaid international boundary line dividing Canada from the United States of America."

Those are the last three lines, page 136.

The LORD CHANCELLOR.—That seems to refer to some definable point:

"To a point where the said centre of the road allowance on the twelfth base line would be intersected by a line drawn due north."

Mr. MCCARTHY.—The line has to be intersected "by a line drawn due north from where the westerly boundary of the Province of Ontario intersects—" You have to find out where that point is. That is just what we are troubled about.

The LORD CHANCELLOR.—One hardly sees how it is to be worked, either in one view or the other.

Mr. MCCARTHY.—The United States bounds the country on the south. Whether the most north-westerly angle of the Lake of the Woods is taken as the line, or the line I contend for is taken as the line—along that lies Ontario. The point where the westerly boundary of Ontario first meets the boundary of the United States is the point of intersection.

Sir MONTAGUE SMITH.—You must find out the entire boundary.

Mr. MCCARTHY.—Yes.

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* DOMINION ACT, 44 VICT., CAP. 14, SEC. 1, (1881).

An Act to provide for the Extension of the Boundaries of the Province of Manitoba.

Whereas, by an Act of the Legislature of the Province of Manitoba, passed during the session thereof held in the present year of Her Majesty's reign, and intituled "An Act to Provide for the Extension of the Boundaries of the Province of Manitoba," the Legislature of that province hath consented to the increase of the same by the alteration of its limits, as hereinafter enacted, upon the terms and conditions hereinafter expressed: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The Province of Manitoba shall be increased as hereinafter defined, that is to say, so that the boundaries thereof shall be as follows:—"Commencing at the intersection of the international boundary dividing Canada from the United States of America by the centre of the road allowance between the twenth-ninth and thirtieth ranges of townships lying west of the first principal meridian in the system of Dominion land surveys; thence northerly, following upon the said centre of the said road allowance as the same is or may hereafter be located, defining the said range line on the ground across townships one to forty-four,* both inclusive, to the intersection of the said centre of the said road allowance by the centre of the road allowance on the twelfth base line in the said system of the Dominion land surveys; thence easterly along the said centre of the road allowance on the twelfth base line, following the same to its intersection by the easterly limit of the District of Keewatin, as defined by the Act thirty-ninth Victoria, chapter twenty-one, that is to say, to a point where the said centre of the road allowance on the twelfth base line would be intersected by a line drawn due north from where the westerly boundary of the Province of Ontario intersects the aforesaid international boundary line dividing Canada from the United States of America; thence due south, following upon the said line to the international boundary aforesaid; and thence westerly, following upon the said international boundary line dividing Canada from the United States of America, to the place of beginning," and all the land embraced by the said description not now within the Province of Manitoba shall, from and after the passing of this Act, be added thereto, and the whole shall, from and after the said date, form and be the Province of Manitoba.

* In this Act of Man., 44 V. c. 1, *supra*, the line is described as being drawn "across townships one to forty-six."

Mr. McCarthy.—Then, my Lords, there are two more despatches to which I think I ought to draw your Lordships' attention. The first is dated 31st December, 1881,* and it is a very long document, from the Attorney-General, or rather from the Lieutenant-Governor of the province, to the Dominion authorities, going over the whole subject again. It commences on page 137, and at page 141 the Lieutenant-Governor says:

"I have called the Ontario Legislature to meet for the despatch of business on the 12th January. I perceive that the Parliament of Canada is to meet in the following month, and I would respectfully urge the great importance of my being officially informed, before the meeting of our legislature, whether the Dominion Government is now willing, with the concurrence of the Legislature of Manitoba, so far as such concurrence is necessary, to agree to the arrangements which have been suggested, and to obtain from Parliament, at its approaching session, the Dominion legislation necessary to give effect to such arrangements."

There is next a despatch of the 27th January, 1882,† which your Lordship will find at page 142. Here we have the *first* response from the Dominion, and that presents the view entertained by the Dominion government, who were still to some extent interested in the matter, and to whom the Lieutenant-Governor of the Province of Ontario had appealed. I refer especially to page 143, commencing with paragraph 8:‡

"The proposal of 1874, referred to in your despatch, that the question in dispute should be referred to arbitration, does not seem to have been treated by either Government as a mode of seeking an authoritative decision upon the question involved as a matter of law, but rather as a means of establishing a conventional line without first ascertaining the true boundary. In corroboration of this view, it is to be noted that of the three gentlemen who made the award referred to in your despatch under the reference of 1872, two were laymen, and only one of the profession of the law. His Excellency's advisers are of opinion that in advance of parliamentary sanction it was not only highly inexpedient, but transcended the power of the government of the day, to refer to arbitration the question of the extent of the North-West Territories acquired by the Dominion by purchase from the Hudson's Bay Company. That territory had been acquired on behalf of, and was in fact held for, all the provinces comprised in the Dominion, and the extent of it was a question in regard to which, if a dispute arose, Parliament only could have absolved the government of the day from the duty of seeking an authoritative determination by the legal tribunals of the country. Such a decision having been once obtained, if it had been found that it promised to be to the convenience of Ontario and the adjoining province that a conventional boundary should be established in lieu of the legal boundary, authority might have been sought from the Legislatures of those Provinces and from the Parliament of the Dominion for the adoption of such a conventional line. That the course pursued was not intended as a means of seeking a legal boundary is further shewn by the course pursued by the Legislature of Ontario, who, under the provision contained in the Imperial Act, 34 and 35 Vict., cap. 38, enabling the Parliament of Canada to increase, diminish or otherwise alter the limits of a province, with the assent of its legislature, passed an Act giving their assent to the limits of their province being changed by Parliament to meet the award, whatever it might be. The passage of such an Act shews that it was not sought that the true boundary line should be ascertained, but that a conventional one should be laid down."

The Lord Chancellor.—Very bad reasoning.

* The Lieutenant-Governor of Ontario to the Secretary of State (Canada), Sess. Papers, Ont., 1882, No. 23.

† The Secretary of State to the Lieutenant-Governor, Sess. Papers, Ont., 1882, No. 69, p. 468.

‡ The elaborate answer of the Province to the despatch here cited, is contained in the despatch from the Lieutenant-Governor to the Secretary of State, 18th February, 1882, printed in Joint App., p. 146, and in Sess. Papers, Ont., 1882, No. 23.

Mr. McCarthy:

"It must further be observed that a Committee of the House of Commons has reported as follows, viz.:"—Then it gives an extract from the report of the Committee of the House of Commons, as follows:—"In reference to the award made by the arbitrators, on the 3rd day of August, 1878, a copy of which is appended, your Committee are of opinion that it does not describe the true boundaries of Ontario. It seems to your Committee to be inconsistent with any boundary line ever suggested or proposed, subsequent to the Treaty of Utrecht (1713). It makes the provincial boundaries run into territory granted by Royal Charter, in 1670, to the Merchants Adventurers of England trading into Hudson's Bay, and it cuts through Indian territories which, according to the Acts, 43 George 3, cap. 138, and 1 and 2 George 4, cap. 66, 'formed no part of the Provinces of Lower Canada or Upper Canada, or either of them.'"

The Lord Chancellor.—All that it comes to is simply an intimation that they are disposed to throw over the award.

Mr. McCarthy.—That is all: I am only reading it with that view. I do not think I need trouble your Lordship with any other observations upon it.

The Lord Chancellor.—If there is anything turns upon it, it does not seem to me that it comes to anything more than that the arbitrators did not intend to make the award except on the actual boundaries which there ought to be as between the parties. But it seems very clear that, *prima facie*, they had no authority to do it without legislation, and did not contemplate doing it without legislation.

Mr. McCarthy.—Then, my Lord, that being so (and that is my contention), the next question to which I propose to direct your Lordships' attention is what the true line is, the award being out of the way—being treated as so much waste paper.

Sir Barnes Peacock.—It might not perhaps be inconvenient upon this point first of all to hear whether there is really anything to be said on the other side.

The Lord Chancellor.—The award may or may not be amongst other circumstances material to the consideration of what the true line is, but you have certainly made a *prima facie* case that the award should not, as a matter of law, bind you without legislation, and we should like to hear whether that is seriously contested.

Mr. McCarthy.—I might mention to your Lordship, before I withdraw from the bar, that my friend Mr. Robinson appears for the Dominion. The Dominion claims to be heard on the question, as the Dominion is interested almost, if not quite, as much as the provinces. By the Act to which reference has been repeatedly made already, no alteration in the limits of a province can be made without the consent of the Dominion Parliament. In point of fact it is the Dominion which makes it, with the consent of the province, and you can well understand how the enlargement of one province might disturb the whole scheme of confederation. The different provinces came into confederation having a certain representation in the Commons, and a certain representation in the Senate, besides certain territorial limits.

Mr. Mowat.—My Lords, I think I might shorten this if I say that I agree that the Dominion has an interest in this question, and I am perfectly willing, so far as I am concerned, that they should be heard if your Lordships think they should.

The Lord Chancellor.—We can hear one counsel, if it is desired, for Manitoba and another for the Dominion, but I suppose they are practically on the same side.

Sir Barnes Peacock.—As I understand, the only question is as between Manitoba and Ontario, and I think it is provided somewhere or other that our decision shall not affect any question between Ontario and the Dominion.

The Lord President.—That is provided in the agreement. They reserve their rights.

Sir Montague Smith.—So that it cannot affect the relations of Ontario with the Dominion. The question before us is simply between the two provinces.

Mr. McCarthy.—I do not so understand it. If your Lordships fix the boundary, it does fix the boundary of Ontario for the purposes of the Dominion as well as for the purposes of the Province.

Sir Montague Smith.—I did not understand that.

Mr. McCarthy.—Oh, yes, my Lord, we are all agreed about that I think.

Mr. Mowat.—Oh, yes.

Sir Barnes Peacock.—I think it is stated somewhere that no question between Ontario and the Dominion shall be affected by our decision here.

Mr. Mc Carthy.—That is in the agreement between the two provinces. The two provinces came to a certain arrangement, and in order to prevent there being any question about it, we put in a clause stating that it was not to be presumed that the agreement between us was to affect any questions between the Dominion and Ontario, and reserving the rights of Ontario as to the same.

The Lord Chancellor.—Then is it agreed between you both, that both are to be bound by our decision?

Mr. Mowat.—Yes, both have agreed to be bound by your Lordships' decision. Is it your Lordships' wish that I should now address myself to the point whether—

Sir Barnes Peacock.—The point whether the award is conclusive.

Mr. Mowat.—If your Lordship pleases.

The Lord Chancellor.—But is it convenient at this point to hear the learned counsel for the Dominion?

Mr. Mowat.—One question put to your Lordships is whether the award is valid?

The Lord Chancellor.—Quite so; but if the counsel for the Dominion wants to add anything, of course this is the right time. We have intimated however, that until we hear something on the other side, there is a *prima facie* case made out to shew that legislation was necessary in order to make the award binding.

Mr. Robinson.—I do not know that I have anything to add. I think it will be waste of time after the intimation your Lordships have given.

Mr. Mowat.—It seems to me, my Lords, that there is a good deal to be said in favour of an opposite view.

The Lord Chancellor.—Then we will now hear it.

Mr. Mowat.—Very well, my Lord. I think I can satisfy your Lordships, independently of any statutory enactment, that provinces situated as these provinces are have a right to enter into an agreement for settling boundaries between them, and that such an agreement is binding without any legislative action.

The Lord Chancellor.—But here, first of all, the question is not independent of any statutory enactment, and, secondly, in determining whether the award, as it has been made, binds, we must see what the agreement was.

Mr. Mowat.—Of course. Then, my Lord, perhaps I may address myself to the point, first, as to what the agreement really was—whether it was that the award should be binding, if the Governments had the power to make it so, without legislative sanction; or whether, though the two governments may have had this power, it was not intended to exercise it, and the award to be binding was to require legislative sanction.

Addressing myself to the former point, I ask your Lordships' attention to the terms of the two Orders in Council. The Order in Council passed in the Dominion and the Order in Council passed in the Province are identical. Now, what is it that these Orders in Council agree to? I assume at present that the two governments had the power of referring the matter to arbitration, the legal power of referring it if they chose to do so, and I will say something subsequently, if your Lordships permit me, to prove that they had the legal power. Assuming now that they had power to bind both governments, and I say that that is the effect of what they did, what is the agreement between them as it is expressed in these Orders in Council;* as it is expressed, first of all, in the Order in Council at page 7, and expressed also in the subsequent Orders?

The LORD PRESIDENT.—The one at page 7 is a report.

Mr. MOWAT.—Yes, but that is the form in which our Orders in Council are always drawn—a report to the Council, approved by the Committee of Council and by the Governor.

Lord ABERDARE.—There are Orders in Council given on the next page. page 8.

Sir MONTAGUE SMITH.—That at page 7 is the report.

Mr. MOWAT.—Your Lordships may take it in this way. First there is the report, and then there is the Order in Council adopting the report. In effect therefore when a report of this kind is made and it is adopted by an order, then the recommendation so adopted becomes the Order in Council.

What is it then that the Province and the Dominion agree to? It is that—

"The determination"—that is the word used—"the determination of a majority of such referees should be final and conclusive upon the limits to be taken as and for such boundaries as aforesaid respectively."

I say that by the interpretation which my learned friends place upon this language, the award is not "final and conclusive;" the award is to be no "determination;" it is not a "determination" in the slightest degree.

The LORD CHANCELLOR.—But you must read that with the next sentence.

Mr. MOWAT.—I quite agree, my Lord, and I was coming to that:

"The undersigned recommends that the Province agree to concurrent action with the Dominion in obtaining such legislation as may be necessary for giving binding effect to the conclusion which may be arrived at, and for establishing the northern and western boundaries of the Province of Ontario in accordance therewith."

What that sentence was intended to provide was in addition to what had been agreed to by the previous sentence. By the previous sentence the award is to be final and conclusive, and by the following sentence any legislation that may be necessary for giving to the award binding effect is to take place. Observe the language: "The undersigned recommends that the Province agree." It was the Government—the Lieutenant-Governor in Council—that was agreeing, and "the Province" means the whole people through its representatives in the Government. The agreement I submit to your Lordships to have been, that by this Order there was a binding obligation on the Province to concurrent legislation with the Dominion, as on the other hand, according to the Orders in Council of the Dominion, there was a binding obligation on the Dominion to concurrent legislation with the Province.

The LORD CHANCELLOR.—But what of the words "for giving binding effect to the conclusion."

* The Orders referred to are:—Report of Hon. Adam Crooks, 10th November, 1874, cited *ante*, p. 7; Order in Council (Ont.,) 25th November, 1874, referred to *ante*, p. 8; Order in Council (Can.,) 12th November, 1874, cited *ante*, p. 8; and the subsequent Orders in Council of the Province and Dominion, respectively, dated 31st July, 1878, printed *ante*, p. 10, notes † and ‡.

Mr. MOWAT.—That expression was used because it was matter of dispute whether governments had the power of acting in such a manner without legislation. I have to satisfy your Lordships that the governments intended that the award should be final and conclusive if they could make it so. It was a question whether they *could* make it so or not, or whether without legislation the award might not be binding upon the governments, and yet perhaps not binding for all purposes without legislation; whether the award, for some purposes, might not require legislation by the Dominion and Ontario Parliaments, or by the Imperial Parliament.

There had been a controversy as to the boundary between the Province of Canada and the Province of New Brunswick many years ago; and in that case an Imperial Act had been passed to give effect to an award made on a reference by the two provincial governments. There being that question, both governments in the present case did all they could by their agreement to make the award final. It would have been a perfectly idle thing, in a great controversy like this, to leave the question to arbitrators if the award was to have no binding character at all. The arbitration in that case would be perfectly nugatory. An arbitration would not advance us one single step towards a settlement. Everybody must at the time have seen that, and everybody must see it now.

The LORD CHANCELLOR.—The reasonable intention of this clause about legislation was that the legislation should take place before the award was known, was it not?

Mr. MOWAT.—My own notion was, that that would be the better course, and I manifested that opinion afterwards by getting an Act passed by the provincial legislature in advance of the award, but the Dominion did not take the same view.

The LORD CHANCELLOR.—Have you evidence that attempts were made to get legislation when it might have been a matter of common consent?

Mr. MOWAT.—No such evidence appears. The extent of territory which was then in question was very large. The Dominion had been claiming as part of Ontario, before the settlement with the Hudson's Bay Company, nearly one million square miles instead of the 100,000 which the arbitrators have given us.

The LORD CHANCELLOR.—Both parties seem to have been willing to take their chance, and when that happens it is very natural that each should be willing afterwards to use his power to recede from the agreement if he could.

Mr. MOWAT.—That I hope is not the legal effect of the language employed, for it certainly was not what was intended by the two governments at the time. There has since been a change of government in the Dominion, and different views are entertained by the present government from those which were entertained by the government in power when the agreement was made. We did not at all suppose that the effect of the reference to future legislation was anything more than to make it as obligatory as the governments could possibly make it that the award should be conclusive. In the first place they agree in so many words that it shall be final and conclusive; they do not say that any legislation shall be necessary, and there is no provision for any legislation beyond what is absolutely "necessary." Whatever could be shewn to be necessary was to be done. The language is this: "The province agrees to concurrent action in obtaining such legistion *as may be necessary*, for giving binding effect;" but if no legislation was necessary for giving binding effect, neither, under this stipulation, could ask for legislation. It was only if it should appear that legislation was necessary that legislation should be had. By the terms of the agreement, "the Province" and "the Dominion" were agreeing to be bound; not merely the governments. By the Ontario Order in Council, so far as the government could bind, the Province was to be bound; by the Dominion Order in Council the Dominion government was to be bound. What I urge upon your Lordships is that the agreement about legislation is an additional stipulation, and not a qualifying stipulation.

Sir MONTAGUE SMITH.—Do you argue that legislation was not necessary?

Mr. MOWAT.—I contend that it was not necessary.

The LORD CHANCELLOR.—It is difficult to separate the two arguments, as to what they intended to do, and what they could do. Your proposition is that the Governor in Council could alienate the territory of Ontario, or of Canada?

Mr. MOWAT.—No, my Lord, I do not go so far as that.

The LORD CHANCELLOR.—Surely it is necessary for you to say so.

Mr. MOWAT.—That is the way the Dominion government argues against us in one of the printed despatches.

The LORD CHANCELLOR.—And without even an Act of the provincial legislature?

Mr. MOWAT.—But I think I have authority against that view. If your Lordship will permit me to say so, I think I have direct authority that a settlement of boundaries between provinces is not to be regarded as an alienating of territory by the one to the other; that if two provincial governments enter into an agreement for settling boundaries, it is no answer to the binding character of that agreement to suggest that it may involve an alienating of part of the land; it is the Crown in the one case and the other.

The LORD CHANCELLOR.—How does the Governor in Council get his power?

Mr. MOWAT.—My authority for it is the case of *Penn* v. *Lord Baltimore*.

The LORD CHANCELLOR.—I know the case. There were two individual proprietors, under grant from the Crown, of two provinces in North America, and they made a private contract between themselves as to boundaries, and there the English Court of Chancery did have jurisdiction.

Mr. MOWAT.—Yes, my Lord. In the Appendix we have printed in full the charters under which Lord Baltimore and Mr. Penn and their associates acted and entered into that agreement.

The LORD CHANCELLOR.—But there it was a mere question of private rights. The whole of the territory was under charter.

Mr. MOWAT.—But it was not a mere question of the ownership of land; it was a question whether the territory was within the one province or the other.

The LORD CHANCELLOR.—How could the English Court of Chancery have any jurisdiction as to the matter except upon the footing of private rights? Is it not quite clear that it was only on that footing that the court assumed jurisdiction?

Mr. MOWAT.—That court assumed jurisdiction in a matter that involved government, and legislation as well.

The LORD CHANCELLOR.—You may say that that was the consequence of what the court did; but if you cite this as an authority you must take it as you find it. Lord Hardwicke as Lord Chancellor of England, in a suit in the Court of Chancery, treated the agreement as a contract between private persons to be enforced by the Court of Chancery on the principle of compelling people to act conscientiously in the fulfilment of their contracts—upon the principle that the court acted *in personam* and not *in rem*.

Mr. MOWAT.—Yes, my Lord; and it was in that way the court was able to give effect to the agreement, but the first thing that had to be done was to consider whether the agreement was a binding agreement or not.

The LORD CHANCELLOR.—But you cannot take this as a public authority.

Mr. MOWAT.—The case of proprietary governments I submit bears a very strong analogy to the present.

Lord ABERDARE.—You say you are going to prove that two provinces can settle their own disputes without the interference of the Dominion parliament?

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—But is that the question here? Is not the question here whether these two provinces can appropriate certain territory that belongs to the Dominion, and does not belong to either of them?

Mr. MOWAT.—No, my Lord; we claimed that this territory was ours—was Ontario's—and that was the question for the arbitrators.

Lord ABERDARE.—The Dominion claims that it is its own. How can you deal with territory claimed by the Dominion on the plea that two provinces with recognized boundaries, and recognized existences, are dealing with each other's territory?

Mr. MOWAT.—I spoke of "provinces" in a general way. The question before the arbitrators was not between Manitoba and Ontario, but between the Dominion and Ontario.

Sir MONTAGUE SMITH.—That makes it still more difficult, supposing it is an alienation.

Mr. MOWAT.—But, my Lord, I claim it is not alienation. What the province is seeking is not to alienate from the Dominion. It is as to who shall have provincial jurisdiction—whether the territory shall belong to Ontario or to another province; and it is the Crown in both cases. But the Dominion may itself assign this territory away for that purpose.

The LORD CHANCELLOR.—But it seems to me that you are an immense way from your point. That case of Lord Baltimore's I have always understood to rest upon private rights, and it is plainly inapplicable to anything of this kind. The Court of Chancery of England would never have dreamt of assuming jurisdiction to enforce an award of this kind, whether it be properly made or not, and you have to press not merely that the provinces could settle among themselves their boundaries and so on, but that the executive government of a particular Province and the executive government of the Dominion could do it.

Mr. MOWAT.—I have to press that no doubt, and I certainly think that upon that point *Penn* v. *Lord Baltimore* goes a great way as an authority for it.

The LORD CHANCELLOR.—And you have to do that in the face of an Imperial Act* expressly saying that they had to do this thing by legislation.

Mr. MOWAT.—That is going to another point, my Lord. I thought that that Imperial Act* made no difficulty in my way, for this reason. It provides for

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* IMP. ACT, 34 & 35 VICT., CAP. 28.—THE BRITISH NORTH AMERICA ACT, 1871.

An Act respecting the establishment of Provinces in the Dominion of Canada.

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The British North America Act, 1871."

2. The Parliament of Canada may, from time to time, establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may, from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may, from time to time, make provision for the adminstration, peace, order, and good government of any territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively, "An Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada," and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to

only one case. If a province wants to change its boundaries, or is willing to change its boundaries either by diminution or by increase, and the Dominion is willing, then certain provision for that purpose is made, but it does not provide for the case of a disagreement between them as to where the legal boundaries are. The Act does not touch that case at all. If a province is willing or desirous that its boundaries shall be changed, and if the Dominion is willing too, then by the Act in question they can carry that out. I submit, my Lord, that whatever jurisdiction the two governments had before the Act to settle this matter cannot be affected by that Act, because the Act does not cover that ground. There are two cases which may arise; one, where the parties are agreed, and one where they are not agreed. If they are agreed, then that Act applies, and renders it unnecessary to go to the Imperial Parliament for the purpose of giving effect to any change of territory desired; but if they are not agreed, that Act does not meet the difficulty. I submit to your Lordships that it may be properly said that the Dominion and Province ought to be treated as having this power *a fortiori*, if the power existed in the case of *Penn* v. *Lord Baltimore*. The recognized doctrine now is that all colonial matters should be settled locally as far as possible, without coming to the Imperial Parliament. That is the principle of all recent legislation with reference to the colonies, and we have in the British North America Act an express declaration that the form of government, and the principle of government are to be those of the British constitution. A question of this kind between provinces, Lord Hardwicke points out in his judgment, is a question which the King in Council might decide, and would be a proper tribunal for deciding.

The Lord Chancellor.—Where there was no parliamentary government. You do not mean to say that if the question arose as to the limits between England and Scotland, it would be decided by the King in Council?

Mr. Mowat.—I do not know how it might be in that case, but I thought what I have said in regard to the colonies followed from what I find in Lord Hardwicke's judgment. Your Lordships will observe that there is nothing in the Act of 1867, and nothing in any Imperial legislation, as to a settlement of disputed boundaries between a province and the Dominion. Such a case does not fall within any of the powers given to the Dominion Parliament by the British North America Act. If it had done so it might be inferred that it was intended that the matter should be dealt with by the Parliament of Canada, or in any other way that should be provided, but we do not find any such power given to the Dominion Parliament. If I were fortunate enough to be able to satisfy your Lordships that as a general rule provinces may, through their executive, settle a matter of this kind in a binding way, there does not seem to me to be anything in the British North America Act, or any other Imperial Act, that would make the Dominion of Canada an exception to that rule.

Sir. Robert Collier.—Where is the authority?

Mr. Mowat.—This case of *Penn* v. *Lord Baltimore* is the only one I have found. That case is reported in 1 Vesey, senior, page 143. It is stated there that the first objection for the defendant was:

"That the Court has not jurisdiction, nor ought to take cognizance of it; for that the jurisdiction is in the King in Council."

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establish and provide for the government of the Province of Manitoba," shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualifications of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

I ought to mention here that there was a legislative body both in Pennsylvania and Maryland, just as there is in the Dominion and the provinces. The executive was hereditary. In Maryland the executive authority had been given to Lord Baltimore, his heirs and assigns; and in Pennsylvania to William Penn, his heirs and assigns; and the two executives that had entered into the agreement were not the original grantees but their heirs. These circumstances seemed to me to bring the case very closely as a precedent for the present case. Each of the litigant parties there was a colony with both an executive and a legislature, just as is the case here; and there was no express provision in the charter of either of them under which a question of boundaries could be said to be determinable; and I therefore understand Lord Hardwicke as deciding that in such a case the power is incident to the office of the executive.

The LORD CHANCELLOR.—Did he decide it upon any ground connected with public rights at all?

Mr. MOWAT.—I refer to the second objection, which was:

"That if there is not an absolute defect of jurisdiction in this court, yet being a proprietary government and feudal seigniory held of the Crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries by their own act; for such agreement to settle boundaries and to convey in consequence, amounts to an alienation, which these lords proprietors cannot do; but supposing they may alien entirely, they cannot alien a parcel, as that is dismembering."

The third objection was that the agreement ought not to be carried into execution by the court. And this is the way in which Lord Hardwicke dealt with those objections:

"First," he says, "the point of jurisdiction ought, in order, to be considered; and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering, submits to the jurisdiction: much more when there is a proceeding to hearing on the merits, which would be conclusive at common law: yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appear at the hearing, will no more make a decree than where a plain want of equity appears. It is certain that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council; and it is rightly compared to the cases of the ancient *Commotes* and Lordships Marchers in Wales, in which, if a dispute is between private parties, it must be tried in the *Commotes* or Lordships; but in those disputes where neither had jurisdiction over the other, it must be tried by the King and council, and the King is to judge, though he might be a party; this question often arising between the Crown and one lord-proprietor of a province in America: so in the case of the Marches, it must be determined in the King's courts who is never considered as partial in these cases."

He seems to treat the matter as common to provinces generally.

The LORD CHANCELLOR.—It is perfectly clear what the grounds were if you take the judgment as a whole.

Mr. MOWAT.—Will your Lordship allow me to read a sentence or two to shew the way in which Lord Hardwicke deals with the second objection:

"If it was so it would be very unfortunate, for suits and controversies might be, for that reason, endless; and this has subsisted above seventy years. This objection is insisted on at the bar, and not by the answer. The subordinate proprietors may agree how they will hold their rights between themselves; and if a proper suit is before the King in Council on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves."

This was the passage that I spoke about a moment ago on the subject of the effect of an agreement as amounting to a possible alienation. His Lordship said:

"To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made without collusion, (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits."

The executive in the present case is, in some respects, in a stronger position than the executive in that case. Here the Governor-General, the representative of the Crown, is appointed by the Crown, and only holds office during the pleasure of the Crown. By the system now prevailing he has, therefore, the confidence of the Crown and also (in Council) of the representatives of the people—the confidence of his parliament. The case is the same as regards the Lieutenant-Governor. Your Lordships, I take it for granted, will take cognizance of the system of government prevailing in the Dominion and Province. The agreement in question I submit is, *a fortiori*, a binding and legal one, being an agreement entered into by parties having the confidence of the Crown and of the parliament and legislature in the locality. If proprietors situated as Lord Baltimore and Sir William Penn were situated have a right of this kind, I do not see on what ground the power ought to be considered as not possessed by executive governments in such a case as the one before your Lordships now.

Sir BARNES PEACOCK.—Would it not be contrary to the British North America Act, 1871, * section 3, for the executive government of the Dominion and the executive government of the province to alter the boundaries of the province?

Mr. MOWAT.—But I say they have not altered the boundaries. If legislation were necessary, we thought that under that Imperial Act of 1871, if Acts were passed by the Dominion and province, declaring the awarded boundaries to be the boundaries, no objection afterwards could be taken by anybody, because either they were the true boundaries or they were not. If they were not the true boundaries, and involved a change of boundaries, the Act of 1871 would, by its express terms, apply. If they were the true boundaries, and involved no change, no legislation or agreement was necessary to maintain them.

The LORD CHANCELLOR.—The argument then is this, that persons who have not authority to part with an acre of territory may nevertheless make an award which they agree to be conclusive evidence of the true boundary, so as to exclude any inquiry as to whether it was a true boundary or not.

Mr. MOWAT.—My argument implies that they have that power. As Lord Hardwicke said, if the agreement is in good faith, it will be assumed that the boundaries so agreed upon were the true boundaries, and he would not assume there was any alienation.

The LORD CHANCELLOR.—By what is this award made evidence, if it would alienate the smallest part?

Mr. MOWAT.—I put the point as Lord Hardwicke did, "Where two parties"—

The LORD CHANCELLOR.—Two proprietors.

Mr. MOWAT.—Yes, they were, in that case, two proprietors; but the principle seems precisely the same. His lordship put his judgment upon the ground that you are not to assume, in such a case, that there is an alienation, and that if the agreement between the parties had necessarily involved an alienation it would be void; but he said that he could not assume it involved any alienation. The agreement having been entered into in good faith (and the contrary, he said, was not to be presumed), his position was that it must be assumed that the agreement stated the true boundaries, and involved no alienation. He answered in that way the very difficulty your Lordship suggests.

* Printed at page 22, *ante*, note.

Sir BARNES PEACOCK.—Suppose the Province of Ontario were to legislate for land within the new boundary, and any one objected to it, could they say that reference of the Dominion and the Ontario executives would make their acts, or legislation, or administration of justice, binding?

Mr. MOWAT.—That result would be involved, of course.

Sir BARNES PEACOCK.—It is not merely the disposal of the lands, but it is the fixing the territory within which the Province of Ontario is to administer justice, and for which it is to legislate.

Mr. MOWAT.—Yes, my Lord. There must be some authority for fixing it; and how is it to be done? It so happens that so far as our westerly boundary is concerned, the parties have recently agreed that the question should be referred here. That required an agreement; and we have not been able to get the agreement extended to the whole question. Then how is the question to be settled? I do not know any method, if there is no legal power of settling by the parties agreeing in good faith as to what the true boundary is.

Mr. SCOBLE.—I appear with the Attorney-General for Ontario, and I desire to add a few observations only to the argument which he has addressed to your Lordships. And I will first of all take the opportunity of addressing myself to the remark which fell from his Lordship the Lord Chancellor just now, as to the question of alienation as involved in this submission to arbitration. My Lords, if the arbitrators had assumed in any way to diminish or to increase the territory of Ontario by their award, they would have been acting beyond the limits of the reference, and any order that they might have given on that point would have been *ultra vires*.

The LORD CHANCELLOR.—Do you mean it would be *ultra vires* if in point of fact they made the admission?

Mr. SCOBLE.—No, because there I pray in aid the dictum of Lord Hardwicke, and contend that if a boundary is referred to arbitration and the limits are fixed by the arbitrators, that boundary becomes by the action of the arbitrators the old and true limit.

The LORD CHANCELLOR.—It depends on whether the arbitrator has authority to do it. That is at the bottom of the question.

Mr. SCOBLE.—I submit that as a matter of fact there might be an alteration of the limit of the province, but as a matter of law there would be none, because the award of the arbitrators would fix the legal boundary.

Sir MONTAGUE SMITH.—The difficulty is, has the government any power at all to make such a reference? The boundaries are fixed somewhere; the difficulty is to ascertain them.

Mr. SCOBLE.—Yes.

Sir MONTAGUE SMITH.—Courts of law might ascertain them perhaps incidentally, if any question arose; but could any extraneous authority, short of an Act of Parliament, do it? Of course the whole dispute assumes that there is a true boundary somewhere between these two. It is to be neither increased nor diminished as regards either, but it is to be ascertained.

Mr. SCOBLE.—In the view I take of the point which this discussion has reached, legislation is not yet necessary according to the terms of the agreement between the province and the Dominion. Legislation was not contemplated for the purpose of enabling the arbitrators to act. Legislation was only contemplated for the purpose of giving effect to the award the arbitrators might make. In point of fact it was an agreement that if legislation was necessary—

Sir MONTAGUE SMITH.—Then the difficulty is, until legislation, how is the award authoritative so as to have the force of law?

Mr. SCOBLE.—It is binding in conscience.

The Lord Chancellor.—I should like to ask you whether it does not necessarily result from your proposition that if the Council* for the Dominion and the Council* for Ontario had themselves drawn a line upon the map, it would have been within their power to do so without any reference to arbitration or any other proceeding whatever?

Mr. Scoble.—I apprehend it would. It would have been an act of the executive authority of the Dominion, concurred in by the province affected by it.

The Lord Chancellor.—Concurred in by the province? You seem to me in this argument to confound the council with the province.

Sir Robert Collier.—You see it is a province with representative institutions. That makes all the difference.

Mr. Scoble.—True, but the executive power of the government is reserved by the Act which constitutes the Dominion and the province.

Sir Barnes Peacock.—Suppose this award included a part of Rupert's Land which was not formerly part of Quebec, and was given up to the British Government, would that be binding? It would be contrary to an Act of Parliament to say that it should be binding, because the 6th section of the British North America Act, 1867, says that the part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario. Well, if they put anything in by the award which was not part of what constituted Upper Canada, it would be invalid and contrary to this Act.

Mr. Scoble.—That may be so, my Lord, but the contention before the arbitrators was, and the contention here today is, that no portion of country which was not formerly Canada, has been dealt with by the award.

The Lord Chancellor.—That is what will hereafter have to be considered, if we do not admit that this award is to be a binding rule. Of course then we shall have to consider to the best of our power what the real boundary is.

Mr. Scoble.—Yes, my Lord, but the Rupert's Land Act,† if I remember rightly, does not provide boundaries for the territory of Rupert's Land, which at all conflict either with the legislation establishing the Province of Quebec, or with the legislation under which the Province of Upper Canada, now Ontario, was finally established; and therefore, if the arbitrators had as a matter of fact included in their award any portion of the land which is described generally as Rupert's Land, that would not have been in contravention of any Imperial statute, but would have been a proceeding entirely unfettered by parliamentary enactment.

Sir Barnes Peacock.—My view is that if the award included in it any part of Rupert's Land, that part not being part of original Canada, then it was not a part which formed part of Upper Canada. It would be adding to Ontario something which did not belong to Upper Canada, and that would have been contrary to the 6th section of the British North America Act.

Mr. Scoble.—Yes, my Lord, no doubt Ontario is restricted to the limits assigned to Upper Canada by the various acts of authority on that point collected in the evidence before you, The Rupert's Land Act, 1868, is at page 445, and there is no reference there to boundaries whatever.‡

Sir Barnes Peacock.—I think it is all the lands and rights which belong to the Hudson's Bay Company.

Mr. Scoble.—Yes, my Lord, the lands granted under the charter, or purported to be granted, to the Governor and Company of Hudson's Bay. But my argu-

* The Executive Council. † Imp. Act, 31 and 32 Vict., cap. 106—Rupert's Land Act, 1868.

‡ Sec. 2 of the Act is: "For the purposes of this Act, the term 'Rupert's Land' shall include the whole of the lands and territories held, or claimed to be held, by the said Governor and Company"—viz., the Governor and Company of Merchants Adventurers of England trading into Hudson's Bay.

ment upon this question of the power to refer, (for I think it is perfectly clear upon the correspondence, and upon the Orders in Council, that there was no legislative action contemplated necessarily by either party except a declaratory Act after the award had been made), leads me to this point, which has already been referred to by one of your Lordships, namely, as to the power of the executive governments of the Dominion and of the province to deal with a question of this kind, which, I submit, according to Lord Hardwicke's decision, or rather dictum, in the case of *Penn* v. *Lord Baltimore*, is not a dismembering or alienation of any existing province, but a mere ascertaining of the true boundaries of two coterminous provinces. The 9th section of the British North America Act provides that

"The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

I apprehend, my Lord, that entirely saved the royal prerogative in regard to matters of this kind, and left the royal prerogative to be exercised by the Governor-General in Council.

Sir BARNES PEACOCK.—But could the royal prerogative give any thing to Ontario which did not belong to Upper Canada?

Mr. SCOBLE.—No.

The LORD CHANCELLOR.—Could you exercise the royal prerogative to settle boundaries if it included something which did not belong to the province?

Mr. SCOBLE.—The contention is that the province includes the whole of North America, up to the Rocky Mountains, and therefore it could not possibly give any thing which was not contained within the limits of the province as it stood.

The LORD CHANCELLOR.—That may be right or wrong, but is it an answer?

Mr. SCOBLE.—I apprehend that so far as there was no legislation affecting the powers of the executive, the executive could deal with the whole of the lands comprised in the Dominion of Canada, whatever they might be. If there were a legislative enactment fixing the limit of any province, then I admit the executive power could not operate over the lands contained within the province constituted by that legislative enactment, but otherwise, I submit, the power of the executive is free over the whole of the lands included in the Dominion not specifically appropriated.

The LORD CHANCELLOR.—This is the legislative enactment:

"The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the provinces of Upper Canada and Lower Canada shall be deemed to be severed—"

and so on. It says "at the passing of this Act."

Mr. SCOBLE.—That is, your Lordships will see, as far as the two old provinces of Upper and Lower Canada were concerned, and nothing more. It says that old Upper Canada shall be Ontario, and old Lower Canada shall be Quebec. That is the whole effect of that section.

The LORD CHANCELLOR.—The words, "as it exists at the passing of this Act," have reference to a certain state of boundary, and with reference to that the Province of Ontario is constituted.

Mr. SCOBLE.—And that province includes the whole of Upper Canada; and it is to ascertain the boundaries of Upper Canada, now called Ontario, that the reference to arbitration was made; and I submit that was well within the powers of the executive authority.

Sir MONTAGUE SMITH.—Supposing the arbitrators had taken another view, and manifestly straitened the boundary, so that it would not be the whole of the Province of Upper Canada,—would not that have been in the teeth of this Act of Parliament? I mean, is it doubtful?

Mr. SCOBLE.—Except upon Lord Harwicke's decision: I perhaps only ought to call it Lord Hardwicke's opinion, because it was not necessary to the determination of the question of jurisdiction, which was the main question.

Sir MONTAGUE SMITH.—If the arbitrators had authority, no one could assert that that was not the true boundary.

Mr. SCOBLE.—The authority to settle it must be somewhere. Wherever a country is occupied, or claimed, by a government, I apprehend the power to deal with the lands contained within that government must reside somewhere. It must reside either in the executive or legislative authority.

Sir MONTAGUE SMITH.—Suppose the boundaries of two counties in England were in dispute?

Mr. SCOBLE.—They would be settled by an action of ejectment in an ordinary court of law.

The LORD CHANCELLOR.—Of course the legislature can do anything, so long as it is a competent legislature.

Mr. SCOBLE.—I submit that according to the dictum of Lord Harwicke there is authority residing in the executive government.

The LORD CHANCELLOR.—Those two persons who were the only parties before Lord Harwicke could bind themselves.

Mr. SCOBLE.—I think Lord Harwicke goes rather beyond that, my Lord, with great submission, in the general principle which he lays down. He says there:

"It is certain that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion, and propietary government, is in the King and council. . . . Where before the King and council, the King is to judge."

The LORD CHANCELLOR.—That would relate to the crown colonies of course, where the legislative power resides in the King.

Mr. SCOBLE.—I apprehend in a case of boundaries between states, the proper course would be a reference to arbitration. At all events, a legal course would be a reference to arbitration, without appeal to the authority of parliament. I will give your Lordship a recent instance, occurring in this very district of British North America. The question submitted under the treaty of Washington to the Emperor of Germany to determine the boundary between British Columbia and Vancouver Island, and the United States of America, in which the question of the right of—

The LORD CHANCELLOR.—That was between independent states. There is no common legislature between independent states. It can therefore be determined by international compact.

Mr. SCOBLE.—Is not this in the nature of a compact between independent states, depending no doubt upon one government, but still, as regards their rights and legislatures, independent—only controllable by the Dominion in certain respects, but otherwise perfectly free and unfettered in matters relating to their own domestic government and organization. I think the analogy must be taken to exist between two large provinces having independent rights, and the case of two independent states, rather than the case between two private individuals. In the case which is no doubt familiar to your Lordships, though it was not a question of boundary—the case of *The Nawab of the Carnatic* v. *The East India Company*—although the East India Company was then a private company, and subject to the Crown, yet it was held that in its position in India, it was entitled to enter into agreements with independent states in India, and it is put upon that ground by, I think, Lord Commissioner Eyre in giving his judgment, that in a matter of this kind—a matter of treaty as he calls it, although it was not a treaty, because it was more of an agreement, but he uses the old word treaty—in a matter of treaty of this kind the East India Company must be con-

sidered in the light of an independentstate treating with another independent state. So I apprehend here. Of course it may be that an action of ejectment may be tried to settle this question, but surely this is a more convenient way of settling the question once for all, by some inter-provincial agreement, which will prevent harrassing and troublesome litigation of this kind, and I submit, my Lords, that unless it can be shewn that it was *ultra vires* of the executive governments to refer this matter to arbitration, the whole question fails. I submit that as a matter of convenience, and as a matter of right, it was *intra vires* of the executive to refer this matter to arbitration, and that in the preliminary agreement which occurred before the reference, nothing more was done in the way of contemplating legislation than the contemplation of a declaratory Act which should give effect to the award of the arbitrators, thereby making it perfectly certain to all persons interested that the award had become law. It is only since the award that the objection has been taken, that there was no power to refer, and I submit that the executive authority being in the Governor in Council of Canada, the Governor in Council of Canada having agreed to refer, the Province of Ontario through its constituted authorities having also agreed to refer, and the arbitrators having proceeded—

Sir MONTAGUE SMITH.—Your argument goes to this, that it has the effect of law before it is confirmed by the legislatures.

Mr. SCOBLE.—I say it is binding on the two governments.

Sir MONTAGUE SMITH.—It is binding on the two governments ; but the people are not bound, and the courts of justice are not bound by it.

Sir ROBERT COLLIER.—You may say it is binding on everybody.

Mr. SCOBLE.—It is binding on everybody. The government merely represented the people for that purpose.

Sir MONTAGUE SMITH.—What you say amounts to this, that the courts of justice must be bound when it came incidentally before them.

Mr. SCOBLE.—The Ontario Legislature passed an Act and carried out the contract on their part.

Sir ROBERT COLLIER.—But subject to legislation by the Dominion.

Sir BARNES PEACOCK.—That would not make the award binding on the courts of justice of Ontario.

The LORD CHANCELLOR.—It is rather the reverse, because it shews that the Legislature of Ontario did not take your view of the matter.

Mr. SCOBLE.—Then surely there is something to be gathered from this, that the Dominion of Canada, which has the power to disallow Ontario Acts, did not disallow this Act.

The LORD CHANCELLOR.—Why should it have disallowed it, seeing that it had no operation whatever unless the Dominion Parliament should think fit so to legislate ?

Mr. SCOBLE.—Then, my Lord, I submit that the duty of the government of the Dominion was—this award having been made, and, according to the original terms of the agreements, only requiring a declaratory Act to bring it into effect—

Sir MONTAGUE SMITH.—Nobody can enforce on the legislature a duty. Supposing it is a moral duty that they should pass such an Act, nobody can enforce their performance of the duty.

Sir BARNES PEACOCK.—The executive government could not do more than recommend it to the legislature.

Mr. SCOBLE.—They have never done that.

Sir BARNES PEACOCK.—They could not do more than that, and if they did recommend it, and if the Act was not passed, the recommendation would not have any effect.

Mr. SCOBLE.—But they never submitted to the judgment of the Dominion legislature the validity of this award. They have never brought forward any Act at all, or taken any proceeding of a legislative character, as far as I am able to find in these papers, submitting the question to the decision of the Dominion legislature, and I would submit that that not having been done we are still in the dark as to whether or not this award will be accepted by the Dominion. We have no means of judging. We say that under the agreement between the parties the Dominion and the Province both agreed to take the necessary steps to procure the passing of the declaratory Acts, and the Dominion not having taken any such step up to this time, and the award not having been rejected by the legislature of the Dominion, it cannot be said that they have carried out their agreement, and I submit that they cannot be heard to impeach the award. If the Dominion legislature had had the question submitted to it, as it was submitted to the Ontario legislature, by an Act brought forward by the executive government, then they might have passed an Act which probably would have prevented this; or possibly I may say—for I do not know what the condition of parties in that part of the world is sufficiently to say what the chances of passing the Dominion legislature are—but possibly they might have passed an Act which would have saved this reference to your Lordships. I say that they cannot be heard to impeach the award now, they not having done what they consented to do under the terms of the reference to arbitration, namely, take steps to get a declaratory Act passed.

Sir BARNES PEACOCK.—Cannot Manitoba dispute it?

Mr. SCOBLE.—No, my Lord.

Sir BARNES PEACOCK.—You say the Dominion cannot dispute it—cannot Manitoba dispute it?

Mr. SCOBLE.—No, my Lord. Manitoba is not affected by this question at all. The Act of the Dominion and the Act of the Manitoba legislature which purport to alter the boundaries of Manitoba by enlarging them, and which purport to be proceedings under the British North America Act, 1871, are not operative, for this reason, that the preliminary consent of Ontario, which is necessary under the Act, has never been obtained, and therefore the whole question is at large as far as Manitoba and Ontario are concerned. The award, so far as it binds the Dominion, binds Manitoba, which was carved out of the North-West Territories, under the Imperial Act, before the award was made, and which the award therefore does not touch. As far as any legislation affecting the disputed territory is concerned, either Imperial or Dominion, there is no Imperial legislation at all, and the Dominion legislation is incomplete, because it is not founded on the consent of the Province of Ontario.

My Lords, I shortly submit that this is really a question which must be looked upon not as a simple question between private individuals, but a question affecting large and important communities, and it is a question which ought to be settled, I will say, not upon mere technicalities, but upon a question of what is the right and proper course to be adopted under the circumstances. Looking at it in that view, I think your Lordships cannot have the slightest difficulty in holding that in proceeding to a reference on this question of disputed boundary, both the Dominion and the Province were taking what was the best course to be taken under the circumstances, and that it was within the powers of the executives of the Dominion and the Province respectively to agree to arbitration. No preliminary consent of the legislatures, either of the Dominion or the Province, was stipulated for in that submission. All the legislative action which was contemplated, was subsequent declaratory Acts, giving effect to the award, or rather carrying out the award, so far as declaratory Acts might be necessary. If that be so, if there was this competency to refer, the award is still binding—binding on

the Province of Ontario, because it admits it to be binding, and because it has taken the steps which it was required to take, under the submission, to make it legally effective throughout the country assigned to it; and binding on the Dominion as yet, because it was one of the conditions that a declaratory Act should be obtained. The Dominion is in default in never having submitted to its legislature any proposition that a declaratory Act of that nature should be passed; and this Board is therefore in the position of not knowing whether or not such an Act, if submitted, would not be passed and the whole question set at rest.

Mr. MOWAT.—As the case is a very important one, I wish to ask whether your Lordships would allow Mr. Haldane, who is with me, to make a few observations upon this point?

The LORD CHANCELLOR.—Three counsel?

Mr. MOWAT.—Of course it would be a matter of grace and favour if he is heard.

The LORD CHANCELLOR.—We cannot make a precedent of hearing three counsel. I have no doubt Mr Haldane would give us useful and great assistance, but it would be a dangerous precedent.

[*The room was cleared, and their Lordships deliberated. After some time counsel and parties were re-admitted.*]

The LORD CHANCELLOR.—Their Lordships are of opinion that the argument must proceed upon the footing that this award has not in itself the force of law.

Mr. MOWAT.—That being so, should I go on now on behalf of the Province of Ontario?

The LORD CHANCELLOR.—Of course it is very difficult indeed to lay down any principle which should give priority. I think if you could arrange it among yourselves, that would be a good thing; if you cannot, we must do so.

Mr. MOWAT.—The Province of Ontario is first on the record.

The LORD CHANCELLOR.—Then that gives you a *prima facie* right, if you wish to go on.

Mr. MCCARTHY.—To that I may just say, my Lord, that the Province of Ontario claims that they have been in possession of a large portion of this territory before the British North America Act; and undoubtedly they were, up to what is called the height of land.

The LORD CHANCELLOR.—The Province of Ontario?

Mr. MCCARTHY.—Yes; the Province of Ontario.

The LORD CHANCELLOR.—Then, there may be several reasons why they should wish to be heard in defence of their possession.

Lord ABERDARE.—Are you going to contend that the Province of Ontario, or Upper Canada, consisted of that which the arbitration gave them, or do you contend for more?

Mr. MOWAT.—Of course I am now to contend for as large an area as I can establish.

Lord ABERDARE.—That opens the whole question?

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—You do not limit it to the question whether or not the finding of the arbitrators was a correct one?

Mr. MOWAT.—No, my Lord. We have a stronger case perhaps on one side, a more conclusive case with regard to the west than with regard to the north; and if we are not to have just the very area that the arbitrators gave us, and do not succeed in getting the northern boundary that they gave us, we want a larger area in another direction.

Lord ABERDARE.—You wish to swallow up the whole of this territory?

Mr. MOWAT.—I do not say the whole, but a further portion. I submit, my Lords, that there is a very strong case indeed in favour of the position that we are entitled to a much larger area than the arbitrators gave us; but the area that they gave us was no doubt an extremely convenient one. Their decision gave us a compact province. They found, as our northern boundary, James' Bay, English River and Albany River. We were quite content, and, on the whole, are contented now with the area awarded to us. It may be a question whether a larger area would be expedient for the province to have: with regard to that, there may be a difference of opinion. If the award is not to be regarded as final, I must lay before your Lordships what there is to be said in favour of much more extensive boundaries. The area actually in dispute now—the area which the arbitrators found, and to which the Dominion disputes our right—consists of something less than 100,000 square miles: but the portion of that area in which Manitoba is interested is only 39,000 square miles, being the western portion. The territory which, before the award, was claimed as part of Ontario, and had been claimed by the old Province of Upper Canada, and then claimed, as part of Upper Canada, by the old Province of Canada, and again, before the settlement with the Hudson's Bay Company, claimed by the Dominion itself as part of Upper Canada, embraces very nearly 1,000,000 square miles, viz., 962,000 square miles. It may not be for the interest of the Province to have so large a territory as that; but if the legal boundaries are to be insisted upon, your Lordships have to find, and will find, how much of that, as matter of law, must be considered as part of Ontario; and if the result is to give inconvenient boundaries, it may involve the necessity of negotiation and so on.

Sir ROBERT COLLIER.—You would hardly wish to obtain an inconvenient boundary.

Mr. MOWAT.—We do not want to obtain inconvenient boundaries, but we must be content with such boundaries as your Lordships hold to be the legal boundaries, and if these happen to be inconvenient we must subsequently try to negotiate terms for the purpose of compromising the matter. The whole area of the province, as limited by the contention of Manitoba, is a little over 100,000 square miles; making the province the smallest of all the large provinces. Our area would be 101,000 square miles, while that of Quebec is 188,000 square miles, or very nearly double, without taking into account any territory to which Quebec may be entitled to the north of the height of land. British Columbia contains 340,000 square miles, making it between three and four times the area of Ontario. Even Manitoba, as now constituted under the Dominion Act, contains 123,000 square miles; so that Ontario would be considerably smaller than even Manitoba. On the other hand, if we succeed in establishing some such boundaries as the arbitrators gave us, we shall still not have much more than half the area of the Province of British Columbia, and only very little more than the area of the Province of Quebec.

Sir ROBERT COLLIER.—What will it be?

Mr. MOWAT.—If we succeed in getting the arbitration boundaries, Ontario would contain about 196,000 square miles. In that case, however, Quebec would have far more than 188,000 square miles, because if we make out a title, as I think we can, to territory north of the height of land, Quebec would also be entitled to territory north of the height of land, so that their 188,000 miles would be enlarged—I do not know how much. I have no estimate as to that, but it would be very considerably.

Then what are our true boundaries? Ontario has the same boundaries as the old Province of Upper Canada had. Upon that point there is no dispute. The British North America Act, 1867, united the Provinces of Canada, Nova

Scotia and New Brunswick. By the Union Act of 1840, the two old Provinces of Upper Canada and Lower Canada were constituted into the new Province of Canada, so that whatever territory the Province of Canada had was part of either Lower Canada or Upper Canada.

Then what was the area, and what the extent, of the old Province of Upper Canada? That province had been created under the Act of 1791, which contains a recital that His Majesty was desirous of dividing the Province of Quebec into two provinces. The Act did not make the division, but provided that if His Majesty carried out his royal intention, the constitution of each of the two provinces should be the constitution set forth in the Act. His Majesty did divide the old Province of Quebec (enlarging it, as we say, at the same time that His Majesty was dividing it) into the two Provinces of Upper and Lower Canada.

That renders it necessary to enquire what the limits were of the old Province of Quebec. That province was constituted by a previous Act of the Imperial Parliament, passed in 1774, which is commonly referred to as The Quebec Act.* It was passed some eleven years after the cession of all French Canada to England. The cession took place under the Treaty of Paris, in 1763. Immediately after the cession, a royal proclamation was issued constituting the Province of Quebec, but with very narrow boundaries. Nothing turns upon that proclamation now.

The first question is as to the Act of 1774, and the limits which it assigned to the Province of Quebec. I shall have to refer to the language in which that Act is expressed. The recital is:

"Whereas His Majesty, by his royal proclamation bearing date the seventh day of October, in the third year of his reign, thought fit to declare the provisions which had

* Imp. Act, 14 Geo. 3., cap. 83, secs. 1 and 2—The Quebec Act, 1774.

An Act for making more effectual provision for the Government of the Province of Quebec in North America.

Whereas His Majesty, by his royal proclamation, bearing date the seventh day of October, in the third year of his reign, thought fit to declare the provisions which had been made in respect to certain countries, territories and islands in America, ceded to His Majesty by the definitive Treaty of Peace concluded at Paris on the tenth day of February, one thousand seven hundred and sixty-three; and whereas by the arrangements made by the said royal proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty, was left without any provision being made for the administration of civil government therein; and certain parts of the territory of Canada, where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said Province of Canada, under grants and concessions from the government thereof, were annexed to the Government of Newfoundland, and thereby subjected to regulations inconsistent with the nature of such fisheries: May it therefore please Your Most Excellent Majesty, that it may be enacted, and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

That all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St. Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude, on the eastern bank of the River Connecticut, keeping the same latitude directly west, through the Lake Champlain, until, in the same latitude, it meets the River St. Lawrence; from thence up the eastern bank of the said river to the Lake Ontario; thence through the Lake Ontario and the river commonly called Niagara; and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank until the same shall be intersected by the northern boundary granted by the charter of the Province of Pennsylvania, in case the same shall be so intersected; and from thence along the said northern and western boundaries of the said province, until the said western boundary strike the Ohio; but in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at that point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania, and thence, by a right line, to the said north-western angle of the said province; and thence along the western boundary of the said province until it strike the River Ohio; and along the bank of the said river, westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay; and also all such territories, islands and countries which have, since the tenth of February, one thousand seven hundred and sixty-three, been made part of the Government of Newfoundland, be, and they are hereby, during His Majesty's pleasure, annexed to, and made part and parcel of the Province of Quebec, as created and established by the said royal proclamation of the seventh of October one thousand seven hundred and sixty-three.

II. Provided always that nothing herein contained relative to the boundary of the Province of Quebec shall in any wise affect the boundary of any other colony.

been made in respect to certain countries, territories and islands in America, ceded to His Majesty by the definitive Treaty of Peace, concluded at Paris on the tenth day of February, 1763—"

Your Lordships will observe that the proclamation only referred to a very small portion of the ceded territory, as I will shew directly:

"And whereas by the arrangements made by the said royal proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty, was left without any provision being made for the administration of civil government therein; and certain parts of the territory of Canada—"

That is not material, I think, for our present purpose. We know, therefore, from the recital of the Act why it was passed. It was passed in view of the cession of Canada to the British Crown, and for the purpose of providing a government for a much more extensive territory than the proclamation had provided for. This was deemed to be necessary because, outside the territory embraced in the proclamation,

"—a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty, was left without any provision being made for the administration of civil government therein."

This demonstrates that the purpose of the Act was to include in the extended Province of Quebec such an extent of country as would embrace all the territory within which there were colonies and settlements of the subjects of France.

The Lord Chancellor.—Settlements in the Province of Canada.

Mr. Mowat.—Yes; it is called there "the Province of Canada," although really there was no Province of Canada. I suppose the reference therefore was to French Canada, which this Act calls "a province," although I do not think it had that name under France.

Lord Aberdare.—The French themselves reserved a portion of what was anciently called Canada, and threw it into Louisiana.

Mr. Mowat.—Yes, my Lord; I shall have to refer to that in a moment. By the treaty, the Mississippi was made the line of division between the British and French possessions, and that part of Canada which was on the west of the Mississippi, Great Britain did not acquire. It was, in effect, thrown into Louisianna, and was thenceforth, so long as France governed it, part of Louisiana.

That recital, I say, is conclusive with regard to the object of the Act; and we know, as a matter of fact—which, if it is disputed at all, I am prepared to establish, beyond any sort of doubt, by the papers which are printed, and the maps—that there were those colonies and settlements all along the east bank of the Mississippi, and further colonies and settlements covering the whole of the North-West Territories to the base of the Rocky Mountains, and northward to the Saskatchewan, besides the posts they had beyond the height of land, towards Hudson's Bay. All through this territory, I say, there were these colonies and settlements of the French. They had taken possession of the country, they had traded there, and were in exclusive possession, and had been so for a long period of time. The Hudson's Bay Company's rights I shall have to speak of by and bye, but I say here that neither the Hudson's Bay Company, nor any other subjects of Great Britain, had gone into that territory until after 1774, with a single exception perhaps of one point not very far from Hudson's Bay. Up to this period, and up to some time afterwards, the company confined itself to the margin of the Bay, and traded with the Indians found there, while the French took possession and spread themselves all over the country.

There is to be placed on the Act a construction which will include all that territory. I will shew other grounds for this construction. Thus, the Act assigned to the Province of Quebec the whole of French Canada north of the line which is described—we claim that the Quebec Act assigned to the Province of Quebec all British Canada north of the southerly line which the Act sets forth.

Mr. McCarthy.—All of French Canada ?

Mr. Mowat.—All of French Canada which had been ceded to Great Britain, north of the described line. Now, what would that include ? It would include the territory along the Mississippi up to its source, because, by the Treaty of 1763 —the treaty of cession*—the Mississippi was made the boundary between the British and French possessions. At that time it was not known how far north the Mississippi had its source, nor was the exact position of its source known, so that the effect of the treaty was that, as all Canada was ceded to England, all of Canada that lay north of the source of the Mississippi would pass to England. That would be the fair construction of the treaty, and that was the construction which it always received.

The Lord Chancellor.—But the southern line on this seems to be along the course of the River St. Lawrence. It says :

"Bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St. Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude on the eastern bank of the River Connecticut, keeping the same latitude directly west through the Lake Champlain until, in the same latitude, it meets the River St. Lawrence ; from thence up the eastern bank of the said river to the Lake Ontario ; thence through the Lake Ontario and the river commonly called Niagara ; and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank until the same shall be intersected by the northern boundary granted by the charter of the Province of Pennsylvania, in case the same shall be so intersected ; and from thence along the said northern and western boundaries of the said province until the said western boundary strike the Ohio ; but in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at that point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania ; and thence, by a right

* The Treaty of Paris, 1763.

*The Definitive Treaty of Friendship and Peace between His Britannic Majesty, the Most Christian King, and the King of Spain. Concluded at Paris, the 10th of February, 1763.**

Art. IV. His Most Christian Majesty renounces all pretensions which he has heretofore formed, or might form, to Nova Scotia or Acadia, in all its parts, and guarantees the whole of it, with all its dependencies, to the King of Great Britain ; moreover, His Most Christian Majesty cedes and guarantees to his said Britannic Majesty, in full right, Canada with all its dependencies, as well as the Island of Cape Breton, and all the other islands and coasts in the Gulf and River St. Lawrence, and in general, everything that depends on the said countries, lands, islands, and coasts, with the sovereignty, property, possession, and all rights, acquired by treaty or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, islands, lands, places, coasts and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample form, without restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned.

Art. VII. In order to re-establish peace on solid and durable foundations, and to remove for ever all subjects of dispute with regard to the limits of the British and French territories on the continent of America, it is agreed that, for the future, the confines between the dominions of His Britannic Majesty and those of His Most Christian Majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the River Mississippi, from its source to the River Iberville, and from thence by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain, to the sea ; and for this purpose the Most Christian King cedes in full right, and guarantees to His Britannic Majesty the river and port of the Mobile, and everything which he possesses or ought to possess, on the left side of the Mississippi, except the town of New Orleans, and the island in which it is situated, which shall remain to France ; provided, that the navigation of the Mississippi shall be equally free as well to the subjects of Great Britain as to those of France, in its whole breadth and length, from its source to the sea, and expressly that part which is between the said Island of New Orleans and the right bank of that river, as well as the passage both in and out of its mouth.

* To which the King of Portugal acceded on the same day.

line, to the said north-western angle of the said province; and thence along the western boundary of the said province until it strike the River Ohio; and along the bank of the said river, westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

Mr. MOWAT.—Yes. Your Lordship will observe that in the beginning of that paragraph the enactment is this:

"That all the territories, islands and countries in North America belonging to the Crown of Great Britain, bounded on the south by a line"—

Now, the opening expression of that indicates the purpose which the Government had in view. The only line which is described is the south line.

What I contend is—and I contend this upon the language of the statute, and upon a mass of evidence which I think is admissible for the purpose of shewing the meaning of the Act, and which seems to me to place the matter beyond any sort of doubt; but in the meantime—I am referring for the moment to the Act only—what I contend is, that the word "northward" in the statutory description does not refer to a line at all, but to the extension northward of the whole territory. Parliament described the south line minutely, and I submit that the true construction is, that, having so described the south line, the word "northward" refers to the whole territory northward to the territory of the Hudson's Bay Company.

The word "northward" does not necessarily mean due north. We have, in the description, the word "west" not as meaning due west, but in a westerly direction, and we have the expression "due west" where due west is intended. Therefore, there is no presumption that "northward" in the Act means due north, and the effect of so construing it would be this: If you construe the word "northward" as referring not to the whole territory north of the described line, but as referring to a line merely, and if you assume that it means "due north," this construction cuts away a very large territory, and a considerable French population in a number of French colonies and French settlements along the Mississippi, as well as the whole of the French colonies and French settlements in the country north of the Mississippi. There is no necessity for that construction, and I submit it is not the one which the Courts would arrive at, even without any extrinsic evidence in favour of our contention perhaps, but certainly without any evidence beyond evidence that there were these colonies and settlements and places which I have mentioned. Grammatically, we cannot say that the word "northward" refers to a line. Look at the language once more:

"That all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs—"

and so on. Now, what are the words which precede "northward." Is it "bounded northward?" Are we to put in the word "bounded" there? That cannot be. "Bounded by a line northward," you would have to say. Even the northern boundary, according to the construction by the other side, is not found in the description.

The LORD CHANCELLOR.—That boundary carries you to the banks of the Mississippi. There is a certain boundary "along the bank of the said river, westward, to the banks of the Mississippi," and then it strikes "northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

Mr. MOWAT.—I may put the point in this way. You may say that the language admits, *prima facie*, of two constructions; that it meant a line

running northward from that point to the Hudson's Bay territory, or that it meant the territory northward from this south line to the Hudson's Bay territory. The second is the construction which, I will shew your Lordships, was intended. The Act does not give a northern boundary at all in any view of the language.

The LORD CHANCELLOR.—No, the line goes "northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hubson's Bay."

Mr. MOWAT.—Yes; and if you treat the word "northward" as referring to a line, you merely get to a point on the territory of the Hudson's Bay Company, and you have nothing in the Act to shew how our northern boundary is to run from that point.

Sir MONTAGUE SMITH.—Do you say the line follows the Mississippi bank northerly?

Mr. MOWAT.—Yes, that is our construction.

Lord ABERDARE.—That would give you the territory which the arbitrators gave you.

Mr. MOWAT.—Yes, and that is our construction now. The construction in times past was that "northward" would embrace (to use the language of this very Act) "all the territories, islands and countries in North America belonging to the Crown of Great Britain, bounded on the south" by that line which is described. And if so, when you have got to the source of the Mississippi, the whole of the British territory north formed part of Quebec. If you draw a due north line from the source of the Mississippi, that would give us all I need in order to sustain the arbitrators' award on the merits; but by such a line you would leave out the French colonies and settlements in the North-West; and the statute did not mean to leave them out—it meant expressly to take them in. That was the very object of the statute. There is no distinction between the French colonies and settlements in one part of Canada and the French colonies and settlements in another part of Canada. Wherever they were, it was intended to bring them into the British Province of Quebec; and if so, the only way of construing the Act is that the word "northward" refers to the whole territory north of the described line up to the territory of the Hudson's Bay Company. That construction would embrace them all.

The LORD CHANCELLOR.—Do you read it thus:

"Along the western boundary of the said Province until it strike the river Ohio; and along the bank of the said river, westward, to the banks of the Mississippi; and along those banks, northward, to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay?"

Mr. MOWAT.—That is a reading which would be sufficient to give Ontario an area as large as the arbitrators have given; but it appears that Parliament did not even intend the Province to be limited in that way.

Lord ABERDARE.—Your contention is, that whenever you get up to the point of the Mississippi, everything directly northward of that, or northwards of a line drawn through the source of the Mississippi, which was English territory, and was not included in the Hudson's Bay territory, was a part of Quebec.

Mr. MOWAT.—Exactly so, my Lord.

The LORD CHANCELLOR.—Do you say the Hudson's Bay territory extended from what is called "northward" of the Mississippi?

Mr. MOWAT.—Yes, from some point to the northward of the source of the Mississippi.

The LORD CHANCELLOR.—Is that contended?

Mr. MOWAT.—Yes, that is contended.

The LORD CHANCELLOR.—So this would be intelligible if you follow the banks of the Mississippi until you come to its source, and then, according to the argument on the other side, there you meet with the southern boundary of the Hudson's Bay territory.

Mr. MOWAT.—They are not content, my Lord, with that construction, judging from the observations of my friend Mr McCarthy in opening. What he said was that we are limited by a north line from the junction of the Ohio and the Mississippi, leaving a space between the meridian of the junction and the Mississippi.

The LORD CHANCELLOR.—The source of the Mississippi seems to be on a line which is nearly due north to, and nearly coincides with, the yellow [*referring to the line of the meridian of the most north-western point of the Lake of the Woods as shewn on the Ontario Boundary Map of 1884*].

Mr. MOWAT.—The arbitrators appear to have taken that view of it, deciding that point against the old contention.

The LORD CHANCELLOR.—If the territory of the Hudson's Bay Company can be brought down to Turtle Lake,* then there could be no difficulty in considering the Act of 1774 in that way?

Lord ABERDARE.—Unless the southernmost boundary of the Hudson's Bay Company were brought down also farther west.

The LORD CHANCELLOR.—According to this preamble, you would stop at the point you reached when you got to the end of the Mississippi, and for that point to coincide with the southern boundary of the Hudson's Bay territory, the words "northward to the southern boundary" would mean "northward along the banks the Mississippi until you come to the southern boundary of the Hudson's Bay Company's territory," and then you stop; and there your southern line stops. You are presumed to have met with the southern boundary of the Hudson's Bay Company, because it says "northward to the southern boundary of the" Hudson's Bay territory.

Mr. MOWAT.—We must consider for a moment what the treaty of cession says with respect to that, and what it cedes. I apprehend it to be this clearly: As all Canada is ceded, and as the Mississippi is to be the division between French territory and English territory, then you would draw a line due west from the Mississippi, and south of that would be French, and north of that would be English, whether it belonged to the Hudson's Bay Company or not.

I have said that unless that construction is adopted you exclude French colonies and settlements. Further, what alone is sufficient, I submit, to demonstrate that this territory is to be included is this: there was no other government provided for the British territory which is said by the opposite construction to be excluded from the operation of the Act. While this Act gives a government to the Province of Quebec, with the description contained here, neither this Act, nor any other Act, nor any executive act, gave any government whatever to the territory said to be excluded.

The LORD CHANCELLOR.—Are you still on the Hudson's Bay territory?

Mr. MOWAT.—I am dealing with the territory to which the Hudson's Bay Company were not entitled.

I am seeking to prove that it is not a due north line from the confluence of the Ohio and the Mississippi which is contemplated here. If the word "northward" in the Act means a due north line from the confluence of the Ohio and the Mississippi, then you cut off 7,000 square miles of territory south of the height of land, of which Upper Canada, and the Province of Canada, and the Dominion of Canada before the settlement with the Hudson's Bay Company, may be said to have been in undisturbed possession, granting lands in it, and exercising juris-

* One of the two farthest sources of the Mississippi—the other being Lake Itasca.

diction over it. It is marked on one of our maps with striped lines in order to shew what the territory is [*producing the Ontario Boundary Map of 1884*]. I had this made for the purpose of making the argument a little more easy.

Sir MONTAGUE SMITH.—Where on the map is the confluence of the two rivers?

Sir ROBERT COLLIER.—Down at the bottom of the purple line.

The LORD CHANCELLOR.—If you strike due north from the confluence, it seems to coincide exactly with the line separating the tract coloured pink, from that striped with yellow and pink crosswise.

Mr. MOWAT.—Yes, and they have been striped in order to make that clear.

Lord ABERDARE.—Was this portion which was granted by the award, ever claimed as a portion of the Hudson's Bay territory—down to the Rainy River—down to the United States boundary?

Mr. MOWAT.—They did claim a portion of it. They never claimed that portion which was south and east of the height of land—here, in the western portion of the Province [*pointing on the map*].

Lord ABERDARE.—Is that marked here?

Mr. MCCARTHY.—It is on the map which I handed in first.

Lord ABERDARE.—In this coloured portion. Did the Hudson's Bay Company claim this as hunting grounds included in their grant of 1670? Is that coloured portion a part of the territory claimed to have been granted to the Hudson's Bay Company?

Mr. MCCARTHY.—Part was, and part was not.

Lord ABERDARE.—The contention is, that the whole of that which was northward of the Mississippi belonged to the Hudson's Bay Company?

Mr. MOWAT.—It is only later in the century that the Hudson's Bay Company made the claim to that extent.

I want to shew that the old Province of Quebec was not confined within these narrow limits of the due north line from the confluence of the Ohio and the Mississippi, and I have mentioned some things which shew this; but there are others also. Immediately after the passing of this Act, a commission was issued to the Governor-General, Sir Guy Carleton,* and that commission describes the Province of Quebec which was to be under his government as being bounded by the bank of the Mississippi to its source. It is at page 375; and it appears to have gone, in the usual course, to the law officers of the Crown, to ascertain whether, as matter of

* BOUNDARY DESCRIPTION IN IMPERIAL COMMISSION TO GOVERNOR-GENERAL CARLETON OF QUEBEC, 27TH DECEMBER, 1774.

And further know you, that we, reposing especial trust and confidence in the prudence, courage and loyalty of you, the said Guy Carleton, of our especial grace, certain knowledge, and mere motion, have thought fit to constitute and appoint you, the said Guy Carleton, to be our Captain-General and Governor-in-Chief in and over our Province of Quebec, in America, comprehending all our territories, islands and countries in North Ameaica, bounded on the south by a line from the Bay of Chaleurs, along the highlands which divide the rivers that empty themselves into the river St. Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude, on the eastern bank of the river Connecticut, keeping the same latitude directly west, through the Lake Champlain, until, in the same latitude, it meets with the river St. Lawrence; from thence up the eastern bank of the said river to the Lake Ontario, thence through the Lake Ontario, and the river commonly called Niagara, and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank until the same shall be intersected by the northern boundary granted by the charter of the Province of Pennsylvania, in case the same shall be so intersected, and from thence along the said northern and western boundaries of the said province, until the said western boundary strikes the Ohio; but in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at that point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania, and thence by a right line to the said north-western angle of the said province, and thence along the western boundary of the said province until it strikes the river Ohio, and along the bank of the said river, westward, to the banks of Mississippi, and northward, along the eastern bank of the said river, to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay, and also all such territories, islands and countries which have, since the tenth day of February, one thousand seven hundred and sixty-three, been made part of the Government of Newfoundland as aforesaid, together with all the rights, members and appurtenances whatsoever thereunto belonging.

law, it corresponded with the provisions of the Act. The law officers were very eminent men: Mr. Thurlow (afterwards Lord Thurlow) and Mr. Wedderburn (afterwards Lord Loughborough). Your Lordships will find that the language is, that Sir Guy Carleton was appointed

"Governor-in-Chief in and over our Province of Quebec, in America, comprehending all our territories, islands and countries in North America, bounded on the south—"

and so on. Then follows a description precisely the same as that in the Act, with this difference: the language is—

"—and along the bank of the said river, westward, to the banks of Mississippi, and northward, along the eastern bank of the said river, to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

So the commission is expressly that the western boundary was along the eastern bank of the river; and it was to include, your Lordships will observe, and under it the Province of Quebec is expressly declared to comprehend, "all our territories, islands and countries in North America," bounded in the way described. There is no exception of any portion of these territories, islands and countries; the commission was to include them, wherever they were to be found.

Now, that was a commission issued immediately after the Act. It shews the mind of the government and parliament at that time, and negatives the construction which the other side endeavour to place upon the Act. I presume too there is no ground whatever for suggesting that the commission is not admissible evidence for this purpose. Further, this being an old Act—over a hundred years old—I submit that it would be in accordance with authorities to look at, for example, the debates in parliament, which are not usually looked at for the purpose of construing an Act of Parliament, but which yet has been done in a large number of cases.

The Lord Chancellor.—I want to get the dates right. I see the date of Sir Guy Carleton's commission is 27th December, 1774. We do not know when the Act received the royal assent, but I see the session of parliament in which it was passed ended upon the 13th of January, 1774; at least it seems to be so stated. If so, the Act must have been passed before Sir Guy Carleton's commission. It is very possible that the Act may have passed before.

Mr. Mowat.—It was before.

The Lord Chancellor.—Yes, I see it is nearly twelve months before.

Mr. Mowat.—The exact date of the passing of the Act was the 13th January, 1774.

[*Adjourned for a short time*].

Mr. Mowat.—My Lords, I have urged the construction of the Act to be, that Quebec was to include all territory north of the described south line. I have urged this upon several grounds. I have urged that it sufficiently appears from the language of the Act, without any extraneous evidence. Secondly, that it further appears from the fact that any other construction would exclude the French colonies and settlements on the east bank of the Mississippi, and also in the North-West territory. I have urged that that construction is further confirmed by the terms of the commission issued immediately afterwards to the Governor-General; and I was going to refer then to the proceedings upon the Bill, contending, in the case of so old an Act as this, that it was proper enough, and consistent with the authorities, to refer to those proceedings. My reference will be a very short one, and the proceedings will make it very clear that the construction intended was the one which I put upon this Act.

The Lord Chancellor.—We must pause before we allow you to travel into that line of argument. What authority have you for the proposition that what was said by any gentleman in parliament is to be admissible as construing an Act of Parliament? If the opinion of Sir Francis Hincks is not admissible to construe an award made by arbitrators of whom he was one, how can the opinion expressed when a Bill is before parliament by any particular member be admissible to construe the Act?

Mr. Mowat.—What I was going to shew was the terms of the Bill as it originally stood, mentioning the changes that had occurred which create the difficulty, and shewing why those changes had been made, and that the changes have nothing to do with any limitation of the extent of territory which the province was to have on the west, and on the north.*

The Lord Chancellor.—You must give us some authority for the use of such matters as evidence. At least they can only express the views of particular members as to what they supposed was in controversy.

Mr. Mowat.—My object is rather to point to the changes made in the matter of the Bill, in its progress through the House and through committee, in illustration and support of my contention. But, for the present, I will pass that point.

I have pointed out that no other provision was made for any other part of French Canada north of that line by means of this Act. I may further mention, in connection with that observation, that before the cession, and while the territory was French, it was under the jurisdiction of the Governor of Canada, which is a circumstance to indicate that the same course would have been followed by the English. No reason has up to this moment been suggested, from any source whatever, why any portion of French Canada should not have been included in the Province of Quebec. Whatever reason there was for putting *any* portion in, applies beyond any sort of doubt to the *whole* of French Canada—to the whole of Canada that belongs now to Great Britain, and which was not owned by the Hudson's Bay Company.

My Lords, these are the principal grounds on which, if we have to rest entirely on the Act of 1774, without anything further, I submit it appears that the whole of British Canada, not including anything that was owned by the Hudson's Bay Company, was included in the Province of Quebec.

But the argument does not rest there. There are other grounds that establish the same thing. In 1783, the treaty between Great Britain and the United States was entered into, by which a very large part of Canada was ceded to the United

* The description in the Bill as it first stood was: "all the said territories, islands and countries, heretofore a part of the territory of Canada, in North America, extending southward to the banks of the River Ohio, westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay, and which said territories, islands and countries are not within the limits of some other British colony, as allowed and confirmed by the Crown, or which have, since the 10th of February, 1763, been made part of the government of Newfoundland."

Mr. Edmund Burke, then a member, objected in the interest of the Province of New York, whose British Agent he was, that this was not a boundary of certainty as between that province and Quebec, and he moved the one which he had proposed, as follows, viz.:—"a line drawn from a point on the east side of Lake Champlain, in 45 degrees north latitude, and by a line drawn in that parallel west to the River St. Lawrence, and up that river to Lake Ontario, and across that lake to the River Niagara, and from Niagara across Lake Erie to the north-west point of the boundary of Pennsylvania, and down the west boundary of that province, by a line drawn from thence, till it strikes the Ohio."

These words down to and inclusive of "thence" were inserted; and the words—"until it strike the Ohio; and along the bank of the said river, westward to the banks of the Mississippi, and northward to the southern boundary of the territory of the Merchants Adventurers of England trading to Hudson's Bay: and also all such territories, islands and countries which have, since the 10th of February, 1763, been made part of the government of Newfoundland, be, and they are hereby, during His Majesty's pleasure, annexed to and made part and parcel of the Province of Quebec,"—were next read.

These amendments of the committee were reported to the House; and the clause as finally agreed to by the House is as it stands in the Act. (See Joint App. pp. 370-374.)

States. The treaty is to be found at pages 533 and 534 of the Joint Appendix.*

This treaty described what should be the southern boundary of British territory in this quarter. It describes the communications from Lake Ontario to Lake Erie and Lake Huron, and then through Lake Huron:

"Thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through Lake Superior northward of the Isles Royal and Philippeaux, to the Long Lake; thence through the middle of said Long Lake and the water communication between it and the Lake of the Woods to the said Lake of the Woods; thence through the said lake to the most north-western point thereof; and from thence on a due west course to the River Mississippi."

That was the treaty. A difficulty occurred, because it was subsequently discovered that a due west line from the most north-western point of the Lake of the Woods would not strike the Mississippi—that the principal source of the Mississippi was at Lake Itasca, or at Turtle Lake, and lay south of the point which was mentioned there.

The LORD CHANCELLOR.—It is further south?

Mr. MOWAT.—Yes, my Lord.

Sir ROBERT COLLIER.—Then the west line would not go near it.

Mr. MOWAT.—No, but then I may mention that there are tributaries of the Mississippi, or rather of the Missouri, which is itself a tributary of the Mississippi—White Earth River, for instance—which a line due west from the point would strike. The White Earth River is near the Rocky Mountains.

Lord ABERDARE.—May not the Missouri have been in their minds as the larger?

Mr. MOWAT.—That is one view of the matter, which we put forward in the evidence. White Earth River is marked on the map; the longitude is 107½°.

The LORD CHANCELLOR.—Was that settled by the Oregon Treaty, or earlier?

Mr. MOWAT.—Earlier, my Lord. The Treaty of 1794 (Jay's Treaty) recited that doubts had arisen, and provided for a joint survey with a view to the ascer-

* TREATY OF VERSAILLES, 1783.

Definitive Treaty of Peace and Friendship between His Britannic Majesty and the United States of America, signed at Paris the 3rd of September, 1783.

ARTICLE II.—And that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be the boundaries, viz., from the north-west angle of Novia Scotia, viz., that angle which is formed by a line drawn due north from the source of St. Croix River to the high lands; along the highlands which divide those rivers that empty themselves into the River St. Lawrence, from those which fall into the Atlantic Ocean, to the north-westernmost head of Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; from thence by a line due west on said latitude until it strikes the River Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario; through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie; through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through Lake Superior, northward of the isles Royal and Philippeaux, to the Long Lake; thence through the middle of said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most north-western point thereof; and from thence on a due west course to the River Mississippi; thence by a line to be drawn along the middle of the said River Mississippi until it shall intersect the northernmost part of the thirty-first degree of north latitude. South, by a line to be drawn due east from the determination of the line last mentioned, in the latitude of thirty-one degrees north of the equator, to the middle of the River Apalachicola or Catahouche; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River, and thence down along the middle of St. Mary's River to the Atlantic Ocean. East, by a line to be drawn along the middle of the River St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid highlands which divide the rivers that fall into the Atlantic Ocean from those which fall into the River St. Lawrence; comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean; excepting such islands as now are, or heretofore have been, within the limits of the said Province of Nova Scotia.

tainment of the principal source or sources of the river, and it was in 1818 that the Convention took place settling the 49th parallel of north latitude as the boundary from the Lake of the Woods west to the Rocky Mountains. Then, the treaty as to the boundary line east of the Lake of the Woods was in 1842; and the Oregon Treaty was in 1846.

The settlement with the United States was an arbitrary one; they did not attempt to do anything more than agree on what the conventional boundary should be. I refer to this for the purpose of calling your Lordships' attention to the fact that a large part of Canada, as contained under the Act of 1774, and as set forth in the commission of Sir Guy Carleton, issued also in 1774, ceased by virtue of the Treaty of Versailles to be British territory; and that in 1786, after that treaty, a new commission* was issued to Sir Guy Carleton, which describes his jurisdiction in the same terms as the treaty.

Lord ABERDARE.—What is the reference to that commission?

Mr. MOWAT.—Page 387. That commission appoints Sir Guy Carleton—

"To be our Captain-General and Governor-in-Chief in and over our Province of Quebec, in America, comprehending all our territories, islands and countries in North America, bounded"—

and so on, precisely in the same way as the treaty. So that there we have a commission to the Governor-General expressly up to the most north-western point of the Lake of the Woods, and thence as far west as should be included in a line due west from that point to the Mississippi, whatever construction that expression should receive under the circumstances. That is again further evidence that there was no intention of stopping at a due north line from the Ohio and Mississippi. That is one of the governmental acts negativing the notion of that being intended. In fact there is not one tittle of evidence in any despatch, in any map, in any governmental act, or in any legislation, in favour of this due north line. The sole thing on which the whole argument for it rests, is what may be gathered from the Act of 1774. Everything else that was done, so far as this point was concerned—every bit of legislation we have, every official paper, every despatch, every map, and all governmental action, both in England and in the colonies—is against the due north line as being the western boundary of the Province of Quebec, or the provinces which have been carved out of it, Upper Canada, Canada, and Ontario. This is one of the commissions which negatives any such thing, because it expressly gives to Sir Guy Carleton, as Governor-General of Quebec, a jurisdiction at all events to the most north-western point of the Lake of the Woods and so much further—

* BOUNDARY DESCRIPTION IN IMPERIAL COMMISSION TO GOVERNOR-GENERAL CARLETON OF QUEBEC, 22ND APRIL, 1786, AFTER THE TREATY OF PEACE WITH THE UNITED STATES.

And further know ye that we, reposing especial trust and confidence in the prudence, courage and loyalty of you, the said Sir Guy Carleton, of our especial grace, certain knowledge and mere notion, have thought fit to appoint you, the said Sir Guy Carleton, to be our Captain-General and Governor-in-Chief in and over our Province of Quebec, in America, comprehending all our Territories, Islands, and Countries in North America, bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River Saint Lawrence from those which fall into the Atlantic Ocean, to the north-westmost head of the Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; from thence by a line due west on the said latitude until it strikes the River Iroquois or Cataraqui; thence along the middle of the said river into Lake Ontario; through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of the said lake to the water communication between that lake and Lake Superior; thence through Lake Superior, northward of the Isles Royal and Phillipeaux, to the Long Lake; thence through the middle of said Long Lake and the water communication between it and the Lake of the Woods to the said Lake of the Woods; thence through the said lake to the most north-western point thereof; and from thence on a due west course to the River Mississippi; and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay; and also all such Territories, Islands, and Countries which have since the tenth of February, one thousand seven hundred and sixty-three, been made part of the Government of Newfoundland, together with all the rights, members, and appurtenances whatsoever thereunto belonging.

Lord ABERDARE.—The description in this commission was just as unintelligible as that in the Treaty, because, after describing the line to Lake Superior, it says this :

"Thence through the middle of said Long Lake and the water communication between it and the Lake of the Woods to the said Lake of the Woods ; thence through the said lake to the most north-western point thereof ; and from thence on a due west course to the River Mississippi "—

which never would have reached there.

Mr. MOWAT.—But it removes any doubt, if it existed, as to the due north line from the Ohio and Mississippi.

Sir ROBERT COLLIER.—It shewed a great ignorance of geography.

Mr. MOWAT.—Yes. Then it would have to be considered what effect had to be given to the expression "due west." It seems to me on that point, since what is called the Mississippi is not to be found due west of that point, that there is no reason why the description should cease until you reach the Rocky Mountains. The object evidently was to include all British territory there.

The LORD CHANCELLOR.—One would also connect that with the original commission to Sir Guy Carleton, which evidently supposed that it was drawn northward from the junction of the Mississippi and the Ohio to a point which probably they supposed to lie to the west of the Lake of the Woods. They were wrong in their notion of the point you have argued. Is it not in substance probable that they meant as much of the old boundary as remained after the cession to the United States ?

Mr. MOWAT.—I think that is what they did mean.

The LORD CHANCELLOR.—Such territory, bounded in the old way, as remained after the cession ?

Mr. MOWAT.—I agree to that view, though I submit that what was intended to be given was the whole of the remaining British territory, with the exception of what was owned by the Hudson's Bay Company.

My Lords, I come now to the Act of 1791, * and to certain matters which occurred immediately afterwards, and afford further very strong confirmation of the construction for which I contend. I have already mentioned that the Act of 1791 did not give the boundaries of the province. It provided for a government in Upper and Lower Canada in case His Majesty should carry out his intention of dividing the province into two, but did not give the line of division ; but when the matter was before parliament, His Majesty communicated to parlia-

* IMPERIAL ACT, 31 GEO. III., CAP. 31 (1791)—THE CONSTITUTIONAL ACT.

An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled An Act for making more effectual provision for the Government of the Province of Quebec, in North America ; and to make further provision for the Government of the said Province.

II. And whereas His Majesty has been pleased to signify, by his message to both Houses of Parliament, his royal intention to divide his Province of Quebec into two separate Provinces, to be called the Province of Upper Canada and the Province of Lower Canada : be it enacted by the authority aforesaid that there shall be within each of the said Provinces respectively a Legislative Council and an Assembly, to be severally composed and constituted in the manner hereinafter described ; and that in each of the said Provinces respectively, His Majesty, his heirs or successors, shall have power during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such Provinces respectively, to make laws for the peace, welfare and good government thereof, such laws not being repugnant to this Act ; and that all such laws being passed by the Legislative Council and Assembly of either of the said Provinces respectively, and assented to by His Majesty, his heirs or successors, or assented to in His Majesty's name, by such person as His Majesty, his heirs or successors, shall from time to time appoint to be the Governor, or Lieutenant-Governor of such Province, or by such person as His Majesty, his heirs and successors, shall from time to time appoint to administer the government within the same, shall be, and the same are hereby declared to be, by virtue of and under the authority of this Act, valid and binding to all intents and purposes whatever, within the Province in which the same shall have been so passed.

ment the line which he contemplated. We have official evidence * of what that line was. It contains what is material for our present purpose. I refer your Lordships to page 393. I need not read the first part because nothing turns on it, but after giving a description up to Lake Temiscaming, the paper goes on to describe the line intended in this way:

"And from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada."

We find several documents in which that language occurs at that period, and I refer to it for two reasons. I submit, my Lords, in the first place, it shews what the Province of Quebec was understood to include and meant to include.

The LORD CHANCELLOR.—Where is Lake Temiscaming?

Lord ABERDARE.—It is due south of the easternmost point of James' Bay.

The LORD CHANCELLOR.—That description would include the greater part if not the whole of Canada, west of the dividing line. It will not help you as to the western boundary.

Mr. MOWAT.—I am referring to it here for the purpose of calling attention to the territory the Crown intended to be included in the Province of Quebec:

"Including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada."

The LORD CHANCELLOR.—That means the whole of Canada, west of the line of division, whatever "Canada" means. The particular boundary divides Upper from Lower Canada, does it not?

Mr. MOWAT.—Yes, my Lord. We have the same expression in the Order in Council afterwards made. I desire to prove to your Lordships that the territory that I want to include was part of Canada, and that being part of Canada, this expression shews it was to be included in Upper Canada. Then this paper was the subject of correspondence also between the officials in this country, after the passing of the Act. Your Lordships will find that at page 397 there is a letter of the Right Honourable Henry Dundas to the Lord President of the Council.† In the second paragraph, your Lordships will see this language:

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* PAPER PRESENTED TO PARLIAMENT PREVIOUS TO THE PASSING OF THE ACT OF 1791, CONTAINING THE PROPOSED DESCRIPTION OF THE LINE OF DIVISION BETWEEN THE PROVINCES OF UPPER AND LOWER CANADA.

[The following is the Copy of the Paper in question, as furnished by the Public Record Office, London, and set out in official documents.]

To commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Point au Baudet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit in the direction of north thirty-four degrees west, to the westernmost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees east, until it strikes the Ottawas' River, to ascend the said river, into the Lake Tomiscanning, and from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada.

† THE RIGHT HONOURABLE HENRY DUNDAS TO THE LORD PRESIDENT.

(*Being the letter referred to in the Imperial Orders in Council of 24th August, 1791.*)

WHITEHALL, 17th August, 1791.

LORD PRESIDENT,

MY LORD,—An Act having passed in the last session of Parliament, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, intituled 'An Act for making more effectual provision for the Government of the Province of Quebec in North America,' and to make further provision for the government of the said Province," and it being provided by the 48th section of the said Act, that by reason of the distance of the said Provinces from this country, and of the change to be made by this Act in the government thereof, it may be necessary that there should be some interval of time between the notification of this Act to the said provinces respectively, and the day of its commencement within the said provinces respectively, it shall and may be lawful for His Majesty, with

"I transmit to your Lordship herewith, by His Majesty's command, a printed copy of the said Act, together with a copy of a Paper presented to Parliament previous to the passing of the said Act, describing the line proposed to be drawn for separating the Province of Upper Canada and Province of Lower Canada."

Then the enclosure follows; and we have the same expression as to what Upper Canada was to include.

The LORD CHANCELLOR.—It is all Canada, west of a certain line.

Mr. MOWAT.—Yes; so that I must shew your Lordships what Canada did include. It is important for me that your Lordships should recognize that we are entitled to all of Canada west of that line. After the Act of 1791, and the previous Act, and the interpretation which was put upon it by the Imperial Government, I think I am entitled to use what I find here—the description as to what the country is to include—as explaining what the Province of Quebec had included under the Act of 1774; and if it does not shew that, and if it is not fair to use it for that purpose, then it shews that it was intended that thenceforward all should be included. There is nothing in the language that would prevent us from placing on it that construction. So that if Quebec, previous to this year, 1791, did not already embrace all of Canada, west of that line, the Orders in Council and other documents referred to—the Orders in Council particularly—operated to give such an increase to the country as included all that which was formerly Canada. The Orders in Council will be found at pages 397 and 399 respectively; and the Proclamation referring to them, and bringing the Act into effect within the respective Provinces, is at page 401.*

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the advice of His Privy Council, to fix and declare, or to authorize the Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the Government there, to fix and declare the day of the commencement of the said Act within the said provinces respectively, provided such day shall not be later than the 31st December, 1791.

I transmit to your Lordship herewith, by His Majesty's command, a printed copy of the said Act, together with a copy of a Paper presented to Parliament previous to the passing of the said Act, describing the line proposed to be drawn for separating the Province of Upper Canada and Province of Lower Canada; and I am to desire that your Lordship will be pleased to lay the same before His Majesty in Council, for His Royal consideration with respect to the fixing and declaring the day of the commencement of the said Act, as well as the boundaries of the said provinces respectively.

I have, etc.,

HENRY DUNDAS.

[*Enclosure in the preceding letter.*]

The proposed line of division.

To commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Bodet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit, in the direction of north, thirty-four degrees west, to the westermost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees east, until it strikes the Ottawa River, to ascend the said river into the Lake Tomiscanning, and from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada.

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* IMPERIAL ORDER IN COUNCIL, 24TH AUGUST, 1791, ESTABLISHING THE PROVINCES OF UPPER AND LOWER CANADA, AND SEPARATING THEM ACCORDING TO A CERTAIN LINE OF DIVISION.

[Copy furnished by the Privy Council Office, London.]

At the court at St. James's, the 24th of August, 1791.

Present:

THE KING'S MOST EXCELLENT MAJESTY.

Lord Chamberlain,	Lord Dover,
Lord Frederick Campbell.	Mr. Secretary Dundas,
Lord Grenville.	Mr. Chancellor of the Exchequer.

Whereas there was this day read at the Board, a Report from the Right Honourable the Lords of the Committee of Council, dated the 19th of this instant, in the words following, viz.:

"Your Majesty having been pleased by your Order in Council, bearing date the 17th of this instant, to refer unto this Committee a letter from the Right Honourable Henry Dundas, one of Your Majesty's Principal Secretaries of State, to the Lord President of the Council, transmitting a printed copy of an Act passed in the last session of Parliament, entitled 'An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled, an Act for making more effectual provision for the government of the Province of Quebec in North America, and to make further provision for the governmen

Lord ABERDARE.—Is this contested by anybody ?

Mr. MOWAT.—Yes; for if this is correct, then the due north line from the confluence of the Ohio and the Mississippi is put out of the question, and that fact makes the great difficulty here, because it is on the west side of the awarded territory that the land is most valuable. That on the north side is not valuable now, but will be some day. It is not a very fertile country, but still is a country that may be inhabited.

Lord ABERDARE.—What I meant was this. They would of course accept that all that was west of that line was Upper Canada. Then the question comes, what is Canada?

Mr. MOWAT.—I shall have to shew that.

The LORD CHANCELLOR.—All that can be inferred from this is, that there is a line fixed between Upper and Lower Canada to the east, about which there is no dispute. It can also be inferred that the northern boundary was the Hudson's Bay territory, but where exactly the western boundary of Canada is, there is nothing whatever to help you.

Mr. MOWAT.—The expression there is that Quebec includes all that is "commonly called or known by the name of Canada." I do not think there is any room for doubt, with all the proofs we have here, that all north of the prescribed

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of the said Province'; and also copy of a Paper presented to Parliament previous to the passing of the said Act, describing the line proposed to be drawn for dividing the Province of Quebec into two separat, provinces, agreeable to Your Majesty's royal intention, signified by Message to both Houses of Parliament to be called the Province of Upper Canada and the Province of Lower Canada, and stating, that by section 48 of the said Act, it is provided, that by reason of the distance of the said Provinces from this country, and of the change to be made by the said Act in the government thereof, it may be necessary that there should be some interval of time between the notification of the said Act to the said Provinces respectively, and the day of its commencement within the said Provinces respectively, and that it should be lawful for Your Majesty, with the advice of your Privy Council, to fix and declare, or to authorize the Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the government there, to fix and declare the day of the commencement of the said Act within the said Provinces respectively, provided that such day shall not be later than the 31st of December, 1791:

"The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, this day took the said letter into their consideration, together with the Act of Parliament therein referred to, and likewise copy of the said Paper describing the line proposed to be drawn for separating the Province of Upper Canada and the Province of Lower Canada; and their Lordships do thereupon agree humbly to report as their opinion to Your Majesty, that it may be advisable for Your Majesty, by your Order in Council, to divide the Province of Quebec into two distinct provinces, by separating the Province of Upper Canada and the Province of Lower Canada, according to the said line of division described in the said Paper copy of which is hereunto annexed:

"And the Lords of the Committee are further of opinion that it may be advisable for Your Majesty, by warrant under your Royal Sign Manual, to authorize the Governor or Lieutenant-Gavernor of the Province of Quebec, or the person administering the government there, to fix and declare such day for the commencement of the said before-mentioned Act within the said two Provinces of Upper and Lower Canada respectively, as the said Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the government there, shall judge most advisable, provided that such day shall not be later than the 31st day of December in the present year, 1791:

"'*The Proposed Line of Division* to commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Bodet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit in the direction of north thirty-four degrees west to the westermost angle of the said Seigneurie of New Longueuil, thence, along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees east, until it strikes the Ottawas River, to ascend the said river into the Lake Tomiscanning, and from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada.'"

His Majesty this day took the said report into His royal consideration, and approving of what is therein proposed, is pleased, by and with the advice of His Privy Council, to order, as it is hereby ordered, that the Province of Quebec be divided into two distinct provinces, to be called the Province of Upper Canada and the Province of Lower Canada, by separating the said two provinces according to the following line of division, viz.:

"To commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Bodet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit, in the direction of north thirty-four degrees west, to the westermost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees east, until it strikes the Ottawas River, to ascend the said river into the Lake Tomiscanning, and from the head of the said lake by a line drawn due north until

line which did not belong to the Hudson's Bay Company was commonly called or known by the name of Canada.

Lord ABERDARE.—All north?

Mr. MOWAT.—Yes, all north of the described line; it was all "commonly called or known by the name of Canada."

The LORD CHANCELLOR.—I should doubt it as a matter of fact, and we have not had anything at present leading to that conclusion. There is nothing to shew that Canada extended further north than the land of the Hudson's Bay Company. Did they go to the North Pole? I am not suggesting that information is to be derived from the physical configuration, when possibly the physical configuration on these points was totally unknown.

Mr. MOWAT.—There is a difficulty from the geography being unknown.

The LORD CHANCELLOR.—If it had been known, such and such boundaries would have been convenient. As it was not known, there is no presumption whatever that the boundaries were fixed with reference to any such considerations.

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it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada.'"

Whereof the Governor, Lieutenant-Governor, or Commander-in-Chief of the Province of Quebec, and all other His Majesty's officers in the said Provinces, and all whom it may concern, are to take notice and yield due obedience to His Majesty's pleasure, hereby signified.

IMPERIAL ORDER IN COUNCIL, 24TH AUGUST, 1791, AUTHORIZING THE FIXING OF A DAY FOR THE COMMENCEMENT OF THE ACT OF THAT YEAR WITHIN THE PROVINCES OF UPPER AND LOWER CANADA RESPECTIVELY.

[Copy from the Public Record Office, London.]

At the Court at St. James's, the 24th of August, 1791.

Present:

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas there was this day read at the Board a Report from the Right Honourable the Lords of the Committee of Council, dated the 19th of this instant, in the words following, viz.:

"Your Majesty having been pleased by your Order in Council, bearing date the 17th of this instant, to refer unto this Committee a letter from the Right Honourable Henry Dundas, one of Your Majesty's Principal Secretaries of State, to the Lord President of the Council, transmitting a printed copy of an Act passed in the last session of Parliament, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled 'An Act for making more effectual provision for the government of the Province of Quebec in North America, and to make further provision for the government of the said Province'; and also copy of a Paper presented to Parliament previous to the passing of the said Act, describing the line proposed to be drawn for dividing the Province of Quebec into two separate provinces, agreeable to Your Majesty's royal intention, signified by Message to both Houses of Parliament, to be called the Province of Upper Canada and the Province of Lower Canada, and stating, that by section 48 of the said Act, it is provided, that by reason of the distance of the said Provinces from this country, and of the change to be made by the said Act in the government thereof, it may be necessary that there should be some interval of time between the notification of the said Act to the said Provinces respectively, and the day of its commencement within the said Provinces respectively, and that it should be lawful for Your Majesty, with the advice of your Privy Council, to fix and declare, or to authorize the Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the government there, to fix and declare the day of the commencement of the said Act within the said Provinces respectively, provided that such day shall not be later than the 31st of December, 1791:

"The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, this day took the said letter into their consideration, together with the Act of Parliament therein referred to, and likewise copy of the said Paper describing the line proposed to be drawn for separating the Province of Upper Canada and the Province of Lower Canada; and their Lordships do thereupon agree humbly to report as their opinion to Your Majesty, that it may be advisable for Your Majesty, by your Order in Council, to divide the Province of Quebec into two distinct provinces, by separating the Province of Upper Canada and the Province of Lower Canada, according to the said line of division described in the said Paper."

His Majesty this day took the said Report into His Royal consideration, and approving of what is therein proposed, was pleased, by and with the advice of His Privy Council, to order that the Province of Quebec be divided into two distinct provinces, to be called the Province of Upper Canada and the Province of Lower Canada, by separating the said two provinces according to the line of division inserted in said Order: And that His Majesty is hereby further pleased to order, that the Right Honourable Henry Dundas, one of His Majesty's Principal Secretaries of State, do prepare a Warrant, to be passed under His Majesty's Royal Sign Manual, to authorize the Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the government there, to fix and declare such day as they shall judge most advisable, for the commencement, within the Province of Upper Canada and the Province of Lower Canada respectively, of the said Act passed in the last session of Parliament, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled An Act for making more effectual provision for the Government of the Province of Quebec, in North America, and to make

Lord ABERDARE.—You have the Lake of the Woods constantly mentioned, but you decline to confine yourself to that.

Mr. MOWAT.—Since the award is not to be recognized, I want to go further if I can.

Sir ROBERT COLLIER.—You will be satisfied with that?

Mr. MOWAT.—If I also get the north boundary which the arbitrators gave us.

Sir BARNES PEACOCK.—It is only the western boundary that is now before us?

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further provision for the Government of the said Province," provided that such day, so to be fixed and declared for the commencement of the said Act, within the said two provinces respectively, shall not be later than the thirty-first day of December, one thousand seven hundred and ninety-one.

STEPH. COTTRELL.

PROCLAMATION OF 18TH NOVEMBER, 1791, FIXING A DAY FOR THE COMMENCEMENT OF THE ACT OF THAT YEAR WITHIN UPPER AND LOWER CANADA RESPECTIVELY.

ALURED CLARKE:

GEORGE THE THIRD, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth.

To all our loving subjects whom these presents may concern, greeting:

Whereas we have thought fit, by and with the advice of our Privy Council, by our Order in Council, dated in the month of August last, to order that our Province of Quebec should be divided into two distinct provinces, to be called the Province of Upper Canada and the Province of Lower Canada, by separating the said two provinces according to the following line of division, viz.:—"To commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Bodet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along said limit in the direction of north thirty-four degrees west to the westernmost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees east until it strikes the Ottawas River, to ascend the said river into the Lake Tomiscanning, and from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada." And whereas by an Act passed in the last session of Parliament, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, intituled. 'An Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," it is provided that by reason of the distance of the said provinces from Great Britain, and the change to be made by the said Act in the government thereof, it may be necessary that there should be some interval of time between the notification of the said Act to the said provinces respectively, and the day of its commencement within the said provinces respectively; and that it should be lawful for us, with the advice of our Privy Council, to fix and declare, or to authorize the Governor or Lieutenant-Governor of our Province of Quebec, or the person administering the Government there, to fix and declare the day of the commencement of the said Act within the said provinces respectively, provided that such day shall not be later than the thirty-first day of December, one thousand seven hundred and ninety-one. And whereas, in pursuance of the said Act, we have thought fit by another Order in Council, bearing date the twenty-fourth day of August last, to authorize our Governor, or, in his absence, our Lieutenant-Governor, or the person administering the Government of our said Province of Quebec, to fix and declare such day as he should judge most advisable for the commencement of the said Act within the Province of Upper Canada and the Province of Lower Canada respectively, and to that effect have, by our warrant to our right trusty and well-beloved Guy, Lord Dorchester, Captain-General and Governor-in-Chief in and over our said Province of Quebec, or in his absence, to our Lieutenant-Governor or Commander-in-Chief of our said Province for the time being, under our signet and Royal sign-manual, bearing date at St. James's, the twelfth day of September last, signified our will and pleasure that he take the necessary measures accordingly:

Know ye, therefore, that our trusty and well-beloved Alured Clarke, Esquire, our Lieutenant-Governor of our said Province of Quebec, in the absence of our said Governor thereof, hath judged it most advisable to fix upon Monday, the twenty-sixth day of December next, for the commencement of the said said Act within the provinces aforesaid respectively; and it is accordingly hereby declared that the said Act of Parliament, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of of His Majesty's reign, intituled 'An Act for making more effectual provision for the government of the Province of Quebec North in America,' and to make further provision for the government of the said Province," shall commence within the said Provinces of Upper Canada and Lower Canada respectively, on Monday, the said twenty-sixth day of December, in this present year one thousand seven hundred and ninety-one, of which all our loving subjects, and all others concerned, are to take notice and govern themselves accordingly.

In testimony whereof we have caused these our Letters to be made Patent, and the Great Seal of our said Province of Quebec to be hereunto affixed. Witness, our trusty and well-beloved Alured Clarke, Esquire, our Lieutenant-Governor and Commander-in-Chief of our said Province of Quebec, Major-General commanding our forces in North America, &c., &c., at our castle of St. Lewis in the City of Quebec, this eighteenth day of November, in the year of our Lord one thousand seven hundred and ninety-one, and in the thirty-second year of our reign.

HUGH FINLAY, *Acting Secretary.* A. C.

Mr. MOWAT.—Yes, and all I have to make out with reference to the Hudson's Bay Company is this, that its boundary does not extend to the territory now claimed by Manitoba.

Lord ABERDARE.—That is not so, because according to you *this* was a portion of old Canada, and not a portion of the Hudson's Bay Company's territory, and is now a portion of Ontario. It is not a mere question of the western boundary, but a question of the northern boundary also.

Mr. MOWAT.—With due respect, this Case has not submitted the point. The Dominion has not concurred in anything being decided now except our western boundary, and therefore, though part of the argument goes beyond that, that has not to be decided now.

Lord ABERDARE.—A question as to the western boundary is how far north it extends.

Mr. MOWAT.—Yes, and therefore I have to prove that the Hudson's Bay territory did not come down to the most northern part that is in dispute between Manitoba and Ontario.

The LORD CHANCELLOR.—Until we have direct evidence bearing on it, it is uncertain that the Hudson's Bay territory included Winnipeg Lake.

Mr. MOWAT.—I think it is certain it did not include the Winnipeg Lake.

Sir ROBERT COLLIER.—What you want to determine is the boundary between the two Provinces; whether north, east, or west, it is the boundary between the two Provinces. That, you say in effect only makes it necessary to draw the western line. That is what we have to determine, the boundary line between the two Provinces of Ontario and Manitoba.

Mr. MOWAT.—Yes, and if I make out that the Hudson's Bay Company's territory did not extend to the old Manitoba, that is all I have to make out. I want to call your Lordships' attention to the fact, first of all, that this is 700 miles from the Bay, so that unless it can be made out against me that the Hudson's Bay Company's territory came down as far as that—

Lord ABERDARE.—Old Manitoba is the Province included within this line—I mean the inner one [*pointing on the map*].

Mr. MOWAT.—Yes. In regard to that part, there can be no difficulty, because the Dominion Act was confirmed by Imperial legislation.

The LORD CHANCELLOR.—Of course, in due order you must shew us whether light is to be attained from the boundary of the Hudson's Bay grant.

Mr. MOWAT.—Yes; perhaps I had better go into that now. The Hudson's Bay Company's charter is to be found at page 341.*

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* THE ROYAL CHARTER INCORPORATING THE HUDSON'S BAY COMPANY, 2ND MAY, 1670.

[Extracts.]

CHARLES THE SECOND, by the Grace of God, King of England, Scotland, France, and Ireland. Defender of the Faith, etc.

To all to whom these presents shall come, greeting:

Whereas our dear entirely beloved Cousin, Prince Rupert, Count Palatine of the Rhine, Duke of Bavaria and Cumberland, etc.; Christopher, Duke of Albemarle, William Earl of Craven, Henry Lord Arlington, Anthony Lord Ashley, Sir John Robinson, and Sir Robert Viner, Knights and Baronets: Sir Peter Colleton, Baronet; Sir Edward Hungerford, Knight of the Bath; Sir Paul Neele, Knight; Sir John Griffith and Sir Philip Carteret, Knights; James Hayes, John Kirke, Francis Millington, William Prettyman, John Fenn, Esquires: and John Portman, Citizen and Goldsmith of London, have, at their own great cost and charges, undertaken an expedition for Hudson's Bay, in the north-west part of America, for the discovery of a new passage into the South Sea, and for the finding some trade for furs, minerals, and other considerable commodities, and by such their undertaking have already made such discoveries as to encourage them to proceed further in pursuance of their said design, by means whereof there may probably arise very great advantages to us and our kingdom.

And whereas the said undertakers, for their further encouragement in the said design, have humbly besought us to incorporate them, and grant unto them and their successors the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks, and sounds, in whatsoever latitude they shall be, that lie within the the entrance of the straits commonly called Hudson's Straits, together with all the lands,

Your Lordships know that the validity of that charter has been very often questioned, but it has never been adjudicated upon.

The LORD CHANCELLOR.—I think on this occassion you can have nothing to do with any question as to its validity.

Mr. MOWAT.—I will assume it is valid, and that the only question is, how far it extends. The object of the charter was trade. The grant of the lands appears, from the face of the instrumen,t to have been merely incident to the intended operations of the Company in the way of trade. It provides however for towns and villages, and colonies, and so on, on the lands that were granted to them. The language of the grant is very large; it is to be found at page 344:

"And to the end the said Governor and Company of Adventurers of England trading into Hudson's Bay may be encouraged to undertake and effectually to prosecute the said design"—that is searching for the north-west passage—"of our more especial grace, certain knowledge and mere motion, we have given, granted and confirmed, and by these presents, for us, our heirs and successors, do give, grant and confirm, unto the said Governor and Company, and their successors, the sole trade and commerce of all the seas, straits, bays, rivers, lakes, creeks, and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's Straits"—

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countries and territories upon the coasts and confines of the seas, straits, bays, lakes, rivers, creeks, and sounds aforesaid, which are not now actually possessed by any of our subjects, or by the subjects of any other Christian Prince or State. * * * * *

And to the end the said Governor and Company of Adventurers of England trading into Hudson's Bay may be encouraged to undertake and effectually to prosecute the said design, of our more especial grace, certain knowledge and mere motion, WE HAVE given, granted and confirmed, and by these presents, for us, our heirs and successors, DO give, grant and confirm, unto the said Governor and Company, and their successors, the sole trade and commerce of all the seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's Straits, together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid, that are not already actually possessed by or granted to, any of our subjects, or possessed by the subjects of any other Christian Prince or State, with the fishing of all sorts of fish, whales, sturgeons and all other royal fishes, in the seas, bays, inlets and rivers within the premises, and the fish therein taken, together with the royalty of the sea upon the coasts within the limits aforesaid, and all mines royal, as well discovered as not discovered, of gold, silver, gems and precious stones, to be found or discovered within the territories, limits and places aforesaid, and that the said land be from henceforth reckoned and reputed as one of our plantations or colonies in America, called "Rupert's Land."

And further we do, by these presents, for us, our heirs and successors, make, create, and constitute the said Governor and Company for the time being, and their successors, the true and absolute lords and proprietors of the same territory, limits and places, and of all other the premises, SAVING ALWAYS the faith, allegiance and sovereign dominion due to us, our heirs and successors, for the same, TO HAVE, HOLD, possess and enjoy the said territory, limits and places, and all and singular other the premises hereby granted as aforesaid, with their and every of their rights, members, jurisdictions, prerogatives, royalties and appurtenances whatsoever, to them the said Governor and Company, and their successors for ever, TO BE HOLDEN of us, our heirs and successors, as of our manor of East Greenwich, in our county of Kent, in free and common soccage, and not in capite or by Knight's service, YIELDING AND PAYING yearly to us, our heirs and successors, for the same, two elks and two black beavers, whensoever and as often as we, our heirs and successors, shall happen to enter into the said countries, territories and regions hereby granted. * * * * * * * * *

And furthermore, of our ample and abundant grace, certain knowledge and mere motion, WE HAVE granted, and by these presents, for us, our heirs and successors, DO grant unto the said Governor and Company, and their successors, that they and their successors, and their factors, servants and agents, for them and on their behalf, and not otherwise, shall for ever hereafter have, use and enjoy, not only the whole, entire, and only trade and traffic, and the whole, entire, and only liberty, use and privilege of trading and trafficking to and from the territory, limits and places aforesaid, but also the whole and entire trade and traffic to and from all havens, bays, creeks, rivers, lakes and seas, into which they shall find entrance or passage by water or land out of the territories, limits and places aforesaid; and to and with all the natives and people inhabiting, or which shall inhabit within the territories, limits and places aforesaid; and to and with all other nations inhabiting any the coasts adjacent to the said territories, limits and places which are not already possessed as aforesaid, or whereof the sole liberty or privilege of trade and traffic is not granted to any other of our subjects. * * * * *

And moreover, our will and pleasure is, and by these presents, for us, our heirs and successors, WE DO GIVE and grant unto the said Governor and Company, and their successors, * * * that it shall and may be lawful to and for the said Governor and Company, and their successors, from time to time, and at all times from henceforth, to erect and build such castles, fortifications, forts, garrisons, colonies or plantations, towns or villages, in any parts or places within the limits and bounds granted before in these presents unto the said Governor and Company, as they in their discretion think fit and requisite. * *

In Witness whereof we have caused these our Letters to be made Patent.

Witness ourself at Winchester, the 2nd day of May, in the two-and-twentieth year of our reign.

By Writ of Privy Seal. PIGOTT.

So far the grant is of the sole trade and commerce, and I believe it is now well recognized that to that extent the charter was void, but not in regard to what follows:

"Together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid, that are not already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State,"

with the right of fishing, and so on.

Lord Aberdare.—And the right of mines.

Mr. Mowat.—Yes.

The Lord Chancellor.—

"And that the said land be from henceforth reckoned and reputed as one of our plantations or colonies in America, called 'Rupert's Land.'"

Mr. Mowat.—Yes, and then it goes on:

"And further we do, by these presents, for us, our heirs and successors, make, create and constitute the said Governor and Company for the time being, and their successors, the true and absolute lords and proprietors of the same territory, limits and places, and of all other the premises, saving always the faith, allegiance and sovereign dominion due to us, our heirs and successors, for the same. To have, hold, possess and enjoy the said territory, limits and places, and all and singular other the premises hereby granted as aforesaid, with their and every of their rights, members, jurisdictions, prerogatives, royalties, and appurtenances whatsover, to them the said Governor and Company, and their successors forever, to be holden of us, our heirs and successors,"

and so on. That is the grant.

The Lord Chancellor.—It is a grant of all unsettled lands, distinctly described as being upon the countries, coasts and confines of certain seas.

Lord Aberdare.—And rivers too.

The Lord Chancellor.—Yes.

Mr. Mowat.—Your Lordships know that a great many charters were issued, about this period, of land in North America, then newly discovered, and in the possession of savages. The land was unknown, and the charters are very large in the powers which they give, and in the extent of land which they purport to grant. Every one of them, I think, was more definite than this charter is; and the construction which has been placed upon them is, that they entitled the grantees to whatever lands they should discover and appropriate, by those means which are recognized in international law as sufficient for that purpose, in the case of a desert country. It is not mere discovery which gives property in a territory of this kind, but it is clearly settled now that more than discovery is required,—possession, occupation, and other things, are necessary as well.

The Lord Chancellor.—That may or may not be material in an international question, but is it material for our present purpose? We want to know what is to be settled between these two provinces. Take Sir Guy Carleton's commission: there the expression is "territory granted."

Mr. Mowat.—Yes, my Lord, and I submit that that means effectually granted.

The Lord Chancellor.—But it does not contemplate any international question.

Lord Aberdare.—Besides, the "occupation" would be occupation of the hunters; who went all round taking beavers and elks.

Mr. Mowat.—But the Company did not do that—they did not leave the shores of the Bay. I can shew your Lordship, beyond any sort of doubt, that until a considerable time after the cession of 1763, when the right to trade in the interior accrued to them in common with other British subjects, the Hudson's Bay Company never did that.

Lord ABERDARE.—They did not occupy all at once.

Mr. MOWAT.—They occupied no part of it. They erected what were called forts, that is, trading posts, made sufficiently strong to resist attacks by the Indians of Hudson's Bay. They had a few such posts on Hudson's Bay, and they traded only with those Indians who came there. They did not go into the country at all.

The LORD CHANCELLOR.—But your proposition is that the words of the Act, which speaks of "territory granted to the Merchants Adventurers of England trading to Hudson's Bay," really relate to nothing except a few forts upon the Hudson's Bay—is that it? What is the subject which these words, according to the ordinary principles of construction, are intended to describe?

Mr. MOWAT.—What I say is, that under these words no interest passed which did not belong to the Crown.

The LORD CHANCELLOR.—But the words are, from the conflux of the Mississippi and Ohio rivers "to the southern boundary of the territory granted"—where do you claim that southern boundary to be?

Mr. MOWAT.—I think it is the southern boundary of such territory as they may have appropriated under the powers which the charter gave to them.

The LORD CHANCELLOR.—How it is possible that such construction can be put upon it, I cannot conceive.

Lord ABERDARE.—That would be limiting them as much too much, as the other construction would perhaps too little.

Mr. MOWAT.—In any case, there is a difficulty in determining where that boundary is.

The LORD CHANCELLOR.—But you must point out something definite that is there, describing it. Supposing you can ascertain the boundary which had been granted, that would be one thing.

The LORD PRESIDENT.—Do you mean that they lost their grant by not acting upon it?

Mr. MOWAT.—Yes, I do mean that; or rather that the grant was to be commensurate only with their actual appropriation or possession.

The LORD CHANCELLOR.—But, then, if that were sound in law it would not have anything to do with us here. This is a boundary dispute.

Lord ABERDARE.—Surely when they leave off at this point of the Mississippi, and then speak of going north to the Hudson's Bay territory, they mean something within reasonable limits, not traversing over hundreds of miles.

Mr. MOWAT.—Which are the words your Lordship refers to?

Lord ABERDARE.—I mean the various definitions which you have given to us, in order to make out that your western boundary under the Act went westerly of a line drawn north of the confluence of the Mississippi and the Ohio, and to a certain point west of the Lake of the Woods, and from thence to the point of intersection with the southern boundary of the Hudson's Bay territory. Now the southern boundary of the Hudson's Bay territory would be close to the Hudson's Bay itself probably.

Mr. MOWAT.—Quite so, my Lord.

Lord ABERDARE.—Well, surely, they must have had in their contemplation some other territory than that.

Mr. MOWAT.—But that expression was used because it was not known how far the Hudson's Bay territory extended. It was always a matter of question. The Hudson's Bay Company had never taken possession there.

Sir MONTAGUE SMITH.—This is as indefinite as it can be.

Mr. MOWAT.—It is extremely indefinite; and, my Lord, it must be made definite, I submit, by knowing to what extent the Hudson's Bay Company were entitled to that territory.

The LORD CHANCELLOR.—But if it was a grant of everything which had not been ceded to or was not in the occupation of some other European countries, is it material whether it was disputed by France or Portugal or any other nation? Is that question material here?

Lord ABERDARE.—It was disputed by France.

Mr. MOWAT.—Yes, my Lord, it was disputed by France; and I can shew that France became the actual owner of all this territory.

Lord ABERDARE.—The Treaty of Utrecht speaks, I think, of things being "restored" to the English Government, and not "ceded," shewing that the English Government claimed all these things that France had been claiming.

Mr. MOWAT.—The despatches on both sides shew that they did not attach any special meaning to the use of the one word rather than the other, and it was rather a matter of sentiment and prejudice in introducing it than anything else. The correspondence shews that clearly.*

There are several considerations which, I think, warrant us in the view we take. I think I can shew your Lordships that all the country, except some of the territory around Hudson's Bay, did belong to France; that they did occupy it, and did possess it, and did own it, and did claim it, and that their right to it was not matter of dispute between England and France. Then I would submit that the words to which your Lordship refers, "territory granted," plainly were intended by parliament to be confined to territory which the Hudson's Bay Company owned.

Why was the territory excluded from Quebec? It was because the Hudson's Bay Company had powers of government within the territory which belonged to them, and therefore there was no necessity for including such territory in Quebec. But if the terms of their grant had given them a larger territory than they had appropriated, or become owners of—if the terms of the grant were such that it might cover territory which belonged to France, and which was ceded to England, in 1763, by France, the title to which came to England through France—that territory would certainly not have been excluded from Quebec, and the reason for excluding it would not have applied. There was a reason for excluding territory in which there was government under the Hudson's Bay Company, but there was no reason for excluding territory which the Hudson's Bay Company under the circumstances had no jurisdiction over; and therefore I say that the words should be construed as meaning territory owned by the Hudson's Bay Company; territory to which they had perfected their title; territory which was theirs, and which therefore would not come within the cession of territory made in 1763 by France to England. Whatever was ceded by France to England, whatever was in such a position that the title to it arose from that cession, was not to be regarded as territory which was to be excluded under those words from the new Province of Quebec.

Lord ABERDARE.—You contend that everything that was not actually occupied, in the sense in which you limit the word occupation, by the Hudson's Bay Company, was a portion of French territory.

Mr. MOWAT.—There was this desert country unoccupied, and by the laws applicable to such cases, as recognized by European nations, it could be appropriated, by any nation. The discoverer is entitled to a moderate time for the purpose of making his title good by occupation and so on, but in this case the Hudson's Bay Company were not the discoverers or occupiers of any territory which Manitoba now comprises. The company through none of their agents had penetrated this territory which is now in dispute. France on the contrary entered

* The Torcy-Prior-Bolingbroke correspondence, 1712-13, printed in Joint App., pp. 500-502, and extracts from which are given *post*, p. 113.

into the country, erected forts and posts, and in this way, and by its traders and trading companies, had as effectual an occupation as the circumstances permitted.

Lord ABERDARE.—Up to what time do you go on to say the Hudson's Bay Company never penetrated?

Mr. MOWAT.—They never penetrated until long after 1774. What took place was this:—After the cession of 1763 the French abandoned the country. It had been ceded to England. The French posts were under the command of French officers generally, and they gave up those posts, some of them when they were demanded, and others they abandoned without a demand. Their Canadian *engagés*, however, with many French and Canadian gentlemen of good family, remained behind in the settlements that had been formed, and continued, in a certain degree, to prosecute the fur trade. Then the English people from Canada and the other Provinces went into this territory, and began trading with the Indians, and re-established some of the French forts, built others, and occupied the territory even in a fuller way than the French themselves had done; and it was not until the effect of all this was very much felt by the Hudson's Bay Company, that they entered into this territory at all, or sent any of their servants or employees into it. The English traders began to form companies, and there was also trading by individuals; but ultimately they were all united into a company called the North-West Company, whose operations were very extensive. Then the Hudson's Bay Company followed these, and after a time began to erect posts where this company had erected them. Things went on without any serious quarrelling between the two companies, until the Earl of Selkirk took an interest in the Hudson's Bay Company, somewhere in the early part of this century. The disturbances then became formidable. But not until the latter part of the last century, and until after all these acts, after the cession to England, after England became the proprietor of the territory—through France, and not through the Hudson's Bay Company at all—did the Hudson's Bay Company go into the interior. They have admitted that. We have got proofs from themselves that they had never gone into the territory at all, but had made use of their posts along the Bay for the purpose of trading there with such Indians as they could get to come to them. On the other hand, the French before the cession, and British subjects, English and French, after the cession, went into the territory, settled there, established themselves there in various ways, and traded with the Indians there.

There were two purposes to be served by the charter. One was the purpose of trading, and the other was the purpose of forming settlements. What I submit is, that the Hudson's Bay Company never made use of the charter for the purpose of settlement at all. They do not appear to have sold a single foot of land, or pretended to sell it, or pretended to occupy it for the purpose of colonization or settlement, from 1670, when their charter was granted, until a large grant was made by the Company, in 1811, to the Earl of Selkirk, nearly 150 years after this charter was made.

Now, my Lords, what is it that is contended for as against Ontario? It is contended that under the words of this charter the whole of the territory washed by the rivers that fall into Hudson's Bay became the property of the company—consisting of about one and a half million square miles; that they were entitled to keep out of it everybody else; that the effect of the charter was to entitle them to keep it in the condition in which it then was, without settlement at all. The company did not want it settled; it was not their interest to have it settled. I am not blaming them for this; they had a right to pursue their own interests in the way best fitted to promote them, but the fact is that it was against

their interest to have the country settled, and they made no attempt, nor pretended to make any attempt, to settle it until differences arose quite recently—during the present century. So that for 150 years they had made no use of their charter for the purpose of settlement, and did not possess themselves of any of these lands.

This long course of proceeding on their part is sufficient, I submit, under the authorities, to shew that this land did not belong to them, and that this land is not to be treated now as belonging to them.

The LORD CHANCELLOR.—Surely that does not bear upon the question. The question we have to consider here is what is the meaning of the boundary of Canada, as defined by the Acts of Parliament and the Treaty of 1783.

Mr. MOWAT.—What I submit is, that when the Act of Parliament says that the boundary of Quebec is to extend to the territory granted to the Hudson's Bay Company, that means effectually granted to the Hudson's Bay Company—territory which the charter, under the circumstances, had the effect of vesting in the Hudson's Bay Company. I cannot conceive that any other way of construing the statute is possible. It is not what loose general words may have been used—more vague than are to be found in any other charter—but what the effect of those words is. Was the grant effectual? Did the interest pass? What is the territory the title to which passed under the charter? All these considerations bear upon the point. Under this charter, no territory passed except what the company chose to appropriate and acquire the sovereignty of for the nation. There has been no case that I have been able to discover—I have heard of no case—in which to any of these old charters an effect was given beyond territory which the grantees themselves acquired by those means. It was never considered, in dealing with the territory embraced in them, that lands or territories were included which the company did not appropriate and make their own in that way. So far from its being considered that those charters granted any territory, we find English monarchs from time to time granting new charters covering the same territory, the general effect ascribed to them being that, notwithstanding the general words contained in them, they were not to be considered as really conveying anything beyond what the companies would appropriate in the way required by international law for the purpose of giving a title.

I submit that when we speak of an instrument granting, the necessary meaning must be, effectually granting; and if I can make out that this charter did not effectually grant certain territory, I make out all that is necessary for the purpose of limiting the territory of the Hudson's Bay Company to what was effectually granted.

Sir MONTAGUE SMITH.—It expressly excludes territories occupied by any other Christian princes—meaning France; but have you any means of shewing to what extent the French did occupy?

Lord ARERDARE.—The French constantly occupied: you will see that if you look at this map [*the Ontario boundary map of 1884*].

The LORD CHANCELLOR.—[*Examing another map.*] From this map it appears that "Rupert's Land" was the known denomination of a large district in North America—the same denomination as we have in the Hudson's Bay charter.

Mr. MOWAT.—But are we to be bound by this map? It is a map prepared at the instance of the Company, to shew the territories claimed by them as Rupert's Land.*

The LORD CHANCELLOR.—I do not say that I look upon this map as proving the absolute boundary, but it does seem legitimate to refer to it as against the

* Arrowsmith's "Map of North America" attached to the Report from the Select Committee of the House of Commons on the Hudson's Bay Company, 1857.

extraordinary idea you are suggesting, that we should limit what is described in the boundary words by considering what might or might not have been the legal rights of the Hudson's Bay Company if they had been contested.

Mr. MOWAT.—But your Lordship will find a great many more maps which treat the territory which is now Manitoba, as being Canada. You will find perhaps ten maps describing it in that way for one in which it is called Rupert's Land.

The LORD CHANCELLOR.—If we have any map of any antiquity, I do not see why we should not look at it. I do not say now what decision we might come to upon it, but for you to contend that Rupert's Land means nothing at all is most extraordinary.

Mr. MOWAT.—I do not contend that, but I say Rupert's Land does not come down to this region.

The LORD CHANCELLOR.—If you can make that out, well and good, but your general proposition that we can use only maps which shew something which was actually settled and in colonization by the Hudson's Bay Company is absurd almost on the face of it.

Mr. MOWAT.—Probably that may be stating the case too strongly. What I meant to put was that the Hudson's Bay territory did not come down to that now in dispute between Ontario and Manitoba.

The LORD CHANCELLOR.—That is another proposition.

Mr. MOWAT.—Then, my Lords, I think it will be convenient if your Lordships will allow me to shew your Lordships what the evidence is as to this matter.

These old charters are always governed, I apprehend, by the consideration of what was done under them. The charters referring to the newly discovered America particularly require a construction of that kind, but I understand that that is the general rule in regard to all the old grants—that what was possessed under them is extremely material in determining what they are to be considered as covering.

Now I wish to shew your Lordships what the Hudson's Bay Company possessed under this charter, and then your Lordships will consider how far they had the effect of entitling the other side to say that the land and territories in question were effectually granted or not under those words. I think your Lordships, on consideration, will say that no territory will be excluded from Quebec as belonging to the Hudson's Bay Company, or included in their charter, if the Hudson's Bay Company had not so acted as to entitle themselves to that territory and to govern it; otherwise Parliament would be leaving that territory without any government, and it is perfectly certain that they did not intend to do that.

The LORD CHANCELLOR.—But if it was inhabited only by savages?

Mr. MOWAT.—It was inhabited by French colonists. It would be convenient if your Lordships would allow me, first to shew what the Hudson's Bay Company did, and then what the French were in possession of. Upon this point there is a great deal of evidence, but the result of it all is to make the point very clear—so clear that I think your Lordships will assume it in the remainder of the discussion. There are proofs of all kinds. There are proofs from the English standpoint, there are proofs in French documents, and there are proofs also to be found in the documents of the old Province of Canada, and of the Dominion of Canada itself.

In the first place, take the Hudson's Bay Company's own statement of their title, in 1700, after the Treaty of Ryswick. Your Lordships will find it at page 560, of the Joint Appendix:

"It was then, after the happy restoration of King Charles the Second, that trade and commerce began to revive, and in particular that noblemen and other public-spirited

Englishmen, not unmindful of the discovery and right of the crown of England to those parts in America, designed, at their own charge, to adventure the establishing of a regular and constant trade to Hudson's Bay, and to settle forts and factories, whereby to invite the Indian nations, (who live like savages many hundred leagues up the country), down to their factories, for a constant and yearly intercourse of trade, which was never attempted by such settlements, and to reside in that inhospitable country, before the aforesaid English adventurers undertook the same."

Then, my Lords, at page 580, is this communication from Captain Middleton to Mr. Dobbs, of January, 1742-3, he says:

"I have seriously considered your proposition of laying open the Hudson's Bay trade, and settling the country higher up, upon those great rivers which run into the bay, and though I may agree with you in the great advantage the public would receive from such a settlement (could it be made), both as to their trade and the cutting off communication with the Mississippi, yet I must declare my opinion that it is altogether impracticable, upon many accounts; for I cannot see where we could find people enough that would be willing or able to undergo the fatigue of travelling in those frozen climates, or what encouragement would be sufficient to make them attempt it, with such dangerous enemies on every side; no Europeans could undergo such hardships as those French that intercept the English trade, who are inured to it, and are called by us wood-runners (or *coureurs des bois*), for they endure fatigue just the same as the native Indians, with whom they have been mixed and intermarried for two or three or more generations. As to the rivers you mention, none of them are navigable with anything but canoes, so small that they carry but two men, and they are forced to make use of land carriages nearly the fourth part of the way, by reason of waterfalls, during that little summer they enjoy. Out of 120 men and officers the company have in the bay, not five are capable of venturing in one of those canoes, they are so apt to overturn and drown them. Many of our people have been 20 years and upwards there and yet are not dexterous enough to manage a canoe; so there would be no transporting people that way."

Sir MONTAGUE SMITH.—But after all, what is this?

Sir ROBERT COLLIER.—It is a statement by Middleton, who was "a Commander in the Royal Navy, who had served as master in the employ of the Hudson's Bay Company for many voyages."

Mr. MOWAT.—It is an historical statement.

The LORD CHANCELLOR.—The general fact is not in dispute, that the manner in which the Hudson's Bay Company acted under their grant was to send hunters to get furs into the interior, holding certain communications and relations with the natives, and having certain forts in positions which they found convenient. I suppose that is so very well known that it is not likely to be brought into dispute. The bearing of the context is what I do not understand.

Mr. MOWAT.—They did not send men into the interior in the way your Lordship suggests.

The LORD CHANCELLOR.—To such places as they thought convenient, whether in the interior or not.

Mr. MOWAT.—Yes.

Lord ABERDARE.—Some two or three hundred miles further up I see a fort erected by them before 1742.

Mr. MOWAT.—Yes, Fort Henley, which is stated to have been not more than half that distance up the Albany River. That is the only one they then had away from the shores of the Bay.

It is perfectly clear, I submit, that it was not intended to give to the grantees any power of interfering with other nations. It was not intended by this charter to grant them any territory which would interfere with other nations.

The LORD CHANCELLOR.—What was already settled is expressly excluded.

Mr. MOWAT.—Am I limited to that view of the matter, that it was only what was then possessed by any European nations ?

The LORD CHANCELLOR.—As far as the construction of the charter is concerned, you certainly are. You are at liberty to say if afterwards any European nations settled and acquired certain territory, and it was recognized. The charter might not stand in the way of that. That is another matter.

Mr. MOWAT.—Could it be said of any instrument that it granted what it did not effectually grant ?

The LORD CHANCELLOR.—What is an effectual grant ?

Mr. MOWAT.—A grant so as to convey a title.

The LORD CHANCELLOR.—There is nothing about title. It is a grant of land within certain bounds. I think you are travelling into a question which has little relevancy to the matter in hand, namely, whether or not they did those things which were necessary to give them a good title to the whole territory which they claimed.

Mr. MOWAT.—We have been considering those words as meaning effectually granted.

The LORD CHANCELLOR.—They cannot mean that when used as boundary words. That would be raising all sorts of law and fact, which would make them perfectly useless.

Mr. MOWAT.—Taking the other view, it is extremely uncertain how far the territory extended.

The LORD CHANCELLOR.—The question of fact, investigate by all means; but we are not assisted, to my thinking, in the investigation of the question of fact by entering into questions of law, and whether they were guilty of default or not in not doing things which would be necessary to complete their title.

Mr. MOWAT.—Nothing could be more uncertain than to say that all territory is conveyed "upon the confines" of a country. What does that mean ? Does it mean ten miles, fifty miles, or a hundred miles, or what does it mean ?

Lord ABERDARE.—I suppose in later days the Hudson's Bay Company entered their territory from the south; first, I suppose they entered it through Hudson's Bay, but afterwards from various parts of Canada.

Mr. MOWAT.—Yes. They always entered it from the north at the time of the cession by France; and for more than half a century afterwards they continued to do so.

Lord ABERDARE.—Is there any reason to suppose that that which they in later years occupied as their Hudson's Bay territory, and which extended to the south much farther than you would admit, ought not to be considered as Hudson's Bay territory now for the purpose of this argument ?

Mr. MOWAT.—It was always a matter of dispute, my Lord. After the cession of 1763, the English people going there from the Province of Canada, and the other provinces, always claimed a right to go there as to ungranted English territory. The claim of the Hudson's Bay Company was never acquiesced in. The reason why, after a time, there was no dispute, was that the Hudson's Bay Company took in, as partners, all other persons who were engaged in the trade, and after they united their interests there was, for some time, no longer occasion for active dispute in regard to the matter.

Lord ABERDARE.—Taking your own argument, the land granted by the Hudson's Bay Company to Lord Selkirk in 1814 comes to the bend of the Red River, south of Manitoba.

Mr. MOWAT.—At that time they were claiming the whole no doubt.

After the North-West Company had occupied the territory as I have already mentioned, the Hudson's Bay Company began to follow them, and in that way

they did have, at a late period, a number of posts throughout that territory, and they had these at the time they made that supposed grant. Subsequently, in 1821, the two companies united and jointly carried on the trade and held the posts which before had belonged to each separately.

Lord ABERDARE.—Is it supposed the Hudson's Bay Company would have made grants to Lord Selkirk, and claimed this country as their own, if the limits of Canada extended to the Lake of the Woods?

Mr. MOWAT.—It was in dispute.

Lord ABERDARE.—Was the dispute followed up and enforced?

Mr. MOWAT.—Yes; so far that Lord Selkirk had to release to the company any claim he had under his grant. He could make no use of it in view of the—

The LORD CHANCELLOR.—To what company—to the Hudson's Bay Company?

Mr. MOWAT.—Yes.

Lord ABERDARE.—Can it possibly be supposed, when that state of things was taking place, that that was considered Canada at that time?

Mr. MOWAT.—I think I can shew your Lordship it was so.

Sir ROBERT COLLIER.—That this was a grant not acquiesced in but disputed?

Mr. MOWAT.—Yes; disputed from the moment it was known; disputed actively.

The LORD CHANCELLOR.—By whom? Was it disputed by the Government of Canada?

Mr. MOWAT.—By the Government of Upper Canada, and by the Canadian companies and traders then in the territory. Lower Canada was not interested. And the claim of the Hudson's Bay Company was not acquiesced in by the Imperial Government: they treated the Canadian traders and the Hudson's Bay Company as standing there on equality, as British subjects.

The LORD CHANCELLOR.—Where is that?

Mr. MOWAT.—For example, I may refer your Lordship to page 207 of the Joint Appendix. This is from the Adjutant-General's office, and is dated at Quebec, 17th April, 1816. It is one of a number of documents which shew that the Earl of Selkirk's claim was anything but acquiesced in on the part of the Government. Some of them go further than others on the subject, but they all shew that clearly enough:

"SIR,—The Earl of Selkirk having represented to the Administrator in Chief, and Commanding General of the forces, that he has reason to apprehend that attempts may be made upon his life in the course of the journey through the Indian country which he is about to undertake, His Excellency has, in consequence, been pleased to grant his Lordship a military guard for his personal protection against assassination. This party, which is to consist of two sergeants and twelve rank and file of the Regiment De Meuron, is placed under your command, and I am commanded to convey to you the positive prohibition of His Excellency the Lieutenant-General commanding the forces, against the employment of this force for any other purpose than the personal protection of the Earl of Selkirk. You are particularly ordered not to engage yourself or the party under your command in any disputes which may occur betwixt the Earl of Selkirk and his *engagés* and *employés* and those of the North-West Company, or to take any part or share in any affray which may arise out of such disputes.

"By such an interference on your part, you would not only be disobeying your instructions, but acting in direct opposition to the wishes and intentions of the Government, to the countenance, support and protection of which each party has an equal claim."

The North-West Company was insisting that the territory belonged to the British Crown for the general benefit of British subjects, and that the Hudson's Bay Company had no particular rights in it. The Earl of Selkirk was contending that they were exclusive owners.

I may also refer your Lordships to the correspondence between the Imperial and Canadian authorities, commencing at p. 142 of the Ontario Appendix.*

The Lord Chancellor.—What we want to know is whether when this arose, and those disputes existed, the Government of Canada alleged that this territory belonged to them? I can see no trace of that. So far as this has any bearing, it has a bearing the other way.

Lord Aberdare.—As I understand, your argument is that these southern territories were only acquired by the Hudson's Bay Company by the union of the company with the North-West Company, and therefore could have formed no part of the Hudson's Bay territory such as is referred to in the definition of the boundaries of Canada in the Act of 1774.

Mr. Mowat.—I do not know that it is quite that. The North-West Company were not entitled to the territory except as Canadians and all other British subjects were. They were merely claiming the common right of all British subjects as against the exclusive claims made by the Hudson's Bay Company.

When afterwards they united with the Hudson's Bay Company, it was their common interest to exclude all except those who had united—all the important traders did unite ultimately. They found it was their common interest to do so. For a time there was no question raised as to jurisdiction or as to territory, the interest of the Canadian and Hudson's Bay companies being alike satisfied; but by and bye it arose again. That is, it arose when other Canadian traders entered the country, and the Red River settlers desired to be freed from the domination of the united companies, and the Government of Canada cast about for new fields to satisfy the tide of advancing immigration.

Sir Robert Collier.—Perhaps it might be convenient to go on with your general argument now. I only suggest that.

Mr. Mowat.—Yes, my Lord.

If it is to be assumed to have been made out, (whatever importance may appear to be attached to it from the authorities that I may present), that the Hudson's Bay Company had not gone beyond the shores of the Bay, and that they had not gone into the interior at all, then I need not trouble your Lordships with anything more upon that point; but I think it should be well understood to be so, whatever the effect of it may be.

Lord Aberdare.—Up to 1774?

Mr. Mowat.—Yes, up to 1774.

Lord Aberdare.—But surely it is a fair argument to say they were in continued occupation of territory after 1774, and that was pretty good evidence of what was originally granted to them by the charter, and understood to be granted to them by the charter.

Mr. Mowat.—Anyone might go in in that way after 1774. All Her Majesty's subjects did go in.

Lord Aberdare.—That is no proof they had a right to go in.

Mr. Mowat.—Your Lordship is referring to the mere fact of possession and what it might shew. It was not by virtue of the charter the Company went in. They, having gone there, in common with others of Her Majesty's subjects, without interference by anybody, and exercising no more rights than the other subjects of Her Majesty exercised, would not be held—

Lord Aberdare.—It was the exercise of a right, and a very strong exercise, when, rightly or wrongly, they granted the large territory to the Earl of Selkirk in 1814. They were generally presided over by men of high position.

* This is a selection of papers relating to the Red River settlement and to the proceedings of Lord Selkirk to the westward of Lake Superior, 1815-1819, from Parliamentary Papers, Imp. Ho. Coms. 1819, No. 219, pp. 1, 4, 42, 56, 61, 62, 71, 72; Return, Imp. Ho. Coms. June 24, 1819, pp. 279, 280, 284, 285, 286.

Mr. MOWAT.—No doubt. Latterly, the extent to which they made their claim was, that they were entitled under a principle of international law. There is no other ground for it that I know of, but that they were entitled under principles of international law—that having the mouths of rivers they were entitled to their banks and to the whole territory they watered.

Lord ABERDARE.—More especially as those rivers and their banks were occupied only by wild Indians.

Mr. MOWAT.—That is the claim they made, and there is no other ground I know of on which they pretended they could claim this territory. The expressions in the charter might mean anything or nothing, they were so extremely vague, but the company latterly endeavoured to give definiteness to these expressions by taking that ground; and of course the waters of this territory we are now speaking of do flow, after running a long distance, into Hudson's Bay.

Charters, too, are to be taken most strongly in favour of the Crown always, and against the grantees; and a construction which claims (through the use of indefinite words of a very general kind, of which the courts have expressed their suspicion, and which they have limited very much in cases I may cite) that the Company were entitled to one million and a half of square miles of territory which they had never entered or gone upon, or used, and which other nations were occupying and having the advantage of, and which the Company were excluded from—

Sir MONTAGUE SMITH.—If you shew that the grant is limited to land that other Christian people were not occupying, there may be something in that argument.

Mr. MOWAT.—Yes. The actual possession by the French did not extend to the whole territory at the date of the charter, but it extended to the whole territory for half a century and more before the Hudson's Bay Company pretended to have got any sort of possession, or to have gone into the territory for any purpose whatever. It was between a century and a century and a half after the French occupation began before the Hudson's Bay Company sent their men into this territory. Some of these things were established clearly and by witnesses so long ago as 1749. A committee of the House of Commons was appointed in that year for the purpose of investigating the whole question in regard to the Hudson's Bay Company. Witnesses were examined on all these points, and we have their testimony now.

Lord ABERDARE.—I have opened your book upon a letter of Mr. Merivale's to the Governor of the Hudson's Bay Company, written in 1858,* where he says, in dealing with their territory, some limitation must be placed, and Vancouver's Island must be excluded from their license. Does this not seem almost necessarily to imply that their territory extended enormously to the west, when he thinks it necessary to exclude Vancouver's Island? Vancouver's Island is to be exempted from the license as already constituted into a colony. That is in 1858.

Mr. MOWAT.—I shall be content with what has been awarded to us. I do not want to contend for anything more, if we get what is awarded on the west as well as the north. It is very important that we should have the water line on the north, because an astronomical line is extremely inconvenient. The Hudson's Bay Company itself, in some discussions, declared it an impracticable thing to have an astronomical line on such large territory. It is a very costly thing to survey, too. Alaska is divided from Canada by an astronomical line. After it passed into the hands of the Americans it was proposed that the line should be surveyed and it was found it would cost an enormous sum to do it. In consequence of

* The Under-Secretary of State for the Colonies to the Governor of the Hudson's Bay Company, January 20th, 1858, Joint App. p. 221; Sess. Paps. Can., 1858, vol. 16, No. 3.

that a temporary arrangement had to be made. It is important we should have the natural boundary which the award gives us, if we can establish to the satisfaction of your Lordships that we are entitled to that or more.

With reference to your Lordship's observation about Vancouver's Island, perhaps I ought to mention that that was not claimed by the Hudson's Bay Company under their charter, but under a license to trade, which in fact gave them, jointly with the North-West Company, exclusive privileges of trade over the so-called Indian territories in North America—beyond what the charter had given them.

Sir ROBERT COLLIER.—Have they a license to trade, independent of their charter?

Mr. MOWAT.—Yes.

Sir ROBERT COLLIER.—When was the license to trade?

Mr. MOWAT.—In 1821.

Lord ABERDARE.—That was no portion of their territory. That was a portion of the English dominion over which they had an exclusive license.

Mr. MOWAT.—Yes. This matter has been before a Parliamentary Committee. Your Lordship may wish to refer to the license. It is at page 421.* It was

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* LICENSE OF EXCLUSIVE TRADE TO THE HUDSON'S BAY COMPANY AND THE NORTH-WEST COMPANY, JOINTLY, 5TH DECEMBER, 1821.

[Extracts.]

GEORGE R.

GEORGE THE FOURTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To all to whom these presents shall come, greeting:

WHEREAS an Act passed in the second year of our reign, intituled, "An Act for regulating the Fur Trade, and for establishing a Criminal and Civil Jurisdiction within certain parts of North America;" wherein it is amongst other things enacted that [recites the Imp. Act, 1 and 2, Geo. 4, cap. 66.]

And whereas the said Governor and Company of Adventurers of England trading into Hudson's Bay, and certain associations of persons trading under the name of the "North-West Company, of Montreal," have respectively extended the fur trade over many parts of North America, which had not been before explored: And whereas the competition in the said trade has been found for some years past to be productive of great inconvenience and loss, not only to the said company and associations, but to the said trade in general, and also of great injury to the native Indians, and of other persons our subjects: And whereas the said Governor and Company of Adventurers of England trading into Hudson's Bay, and William M'Gillivray, of Montreal, in the Province of Lower Canada, esquire, Simon M'Gillivray, of Suffolk Lane, in the City of London, merchant, and Edward Ellice, of Spring Gardens, in the County of Middlesex, esquire, have represented to us that they have entered into an agreement, on the 26th day of March last, for putting an end to the said competition, and carrying on the said trade for 21 years, commencing with the outfit of 1821, and ending with the returns of 1841, to be carried on in the name of the said Governor and Company exclusively: And whereas the said Governor and Company and William M'Gillivray, Simon M'Gillivray, and Edward Ellice, have humbly besought us to make a Grant, and give our Royal License to them jointly, of and for the exclusive privilege of trading with the Indians in North America, under the restrictions and upon the terms and conditions specified in the said recited Act:

NOW KNOW YE, that we, being desirous of encouraging the said trade and remedying the evils which have arisen from the competition which has heretofore existed therein, do grant and give our Royal License under the hand and seal of one of our Principal Secretaries of State, to the said Governor and Company, and William M'Gillivray, Simon M'Gillivray, and Edward Ellice, for the exclusive privilege of trading with the Indians in all such parts of North America to the northward and westward of the lands and territories belonging to the United States of America as shall not form part of any of our provinces in North America, or of any lands or territories belonging to the said United States of America, or to any European government, state or power; and we do by these presents give, grant and secure to the said Governor and Company, William M'Gillivray, Simon M'Gillivray, and Edward Ellice, jointly, the sole and exclusive privilege, for the full period of 21 years from the date of this our Grant, of trading with the Indians in all such parts of North America as aforesaid (except as hereinafter excepted). . . . .

And we do hereby declare that nothing in this our Grant contained shall be deemed or construed to authorize the said Governor and Company, or William M'Gillivray, Simon M'Gillivray, and Edward Ellice, or any person in their employ, to claim or exercise any trade with the Indians on the north-west coast of America to the westward of the Stony Mountains, to the prejudice or exclusion of any citizens of the United States of America who may be engaged in the said trade: Provided always that no British subjects other than and except the said Governor and Company, and the said William M'Gillivray, Simon M'Gillivray, and Edward Ellice, and the persons authorized to carry on exclusive trade by them on Grant, shall trade with the Indians within such limits during the period of this our Grant.

Given at our Court at Carlton House, the 5th day of December, 1821, in the second year of our reign.

By His Majesty's command,

BATHURST.

granted on the 5th of December, 1821, when all the companies united in a general body, it being a powerful one, and no opposition was made to their getting an exclusive right to trade over the whole territory ; and this license was renewed on 30th May, 1838, for another term, and no question of jurisdiction arose for a considerable time afterward. The new license is at page 423.*

Lord ABERDARE.—Suppose that to be the case; turn to page 223, where you will see an answer to Mr. Merivale's letter.† It indicates what they are ready to give up, and it is giving up not a license but actual territory, because it says:

"In communicating this assent on the part of the Hudson's Bay Company, it is, however, right to notice that the territories mentioned as those that may probably be first desired by the Government of Canada, namely, the Red River and Saskatchewan districts, are not only valuable to the Hudson's Bay Company as stations for carrying on the fur trade, but that they are also of peculiar value to the company as being the only source from which the company's annual stock of provisions is drawn."

All that shews they claimed a territorial right over these regions, and attached importance to their surrender. The Red River and Saskatchewan districts are both far beyond that region.

Mr. MOWAT.—My observation referred to Vancouver's Island.

Lord ABERDARE.—I admit that I was surprised to find Vancouver's Island need not be mentioned; but we come now to the Red River, and to the Saskatchewan districts, which are far west of Manitoba, and from the letter of Mr. Merivale one sees the Hudson's Bay Company treat that as part of their territory.

Mr. MOWAT.—Yes.

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* The new License, dated 30th May, 1838, issued in favour of the Hudson's Bay Company, which now, by an amalgamation of interests, represented also the North-West Company. After reciting the Imp. Act, 1 and 2 Vict., cap. 66, and the former license, it proceeds:

"And whereas the said Governor and Company have acquired to themselves all the rights and interests of the said William M'Gillivray, Simon M'Gillivray and Edward Ellice, under the said recited grant, and the said Governor and Company having humbly besought us to accept a surrender of the said grant, and in consideration thereof to make a grant to them, and give to them our Royal License and authority, of and for the like exclusive privilege of trading with the Indians in North America, for the like period, and upon similar terms and conditions to those specified and referred to in the said recited grant; Now, know ye, that in consideration of the surrender made to us of the said recited grant, and being desirous of encouraging the said trade, and of preventing as much as possible a recurrence of the evils mentioned or referred to in the said recited grant; as also in consideration of the yearly rent hereinafter reserved to us: We do hereby grant and give our License, under the hand and seal of one of our Principal Secretaries of State, to the said Governor and Company, and their successors, for the exclusive privilege of trading with the Indians in all such parts of North America, to the northward and to the westward of the lands and territories belonging to the United States of America, as shall not form part of any of our provinces in North America, or of any lands or territories belonging to the said United States of America, or to any European government, state or power, but subject nevertheless as hereinafter mentioned: And we do by these presents give, grant and secure to the said Governor and Company, and their successors, the sole and exclusive privilege, for the full period of 21 years from the date of this our grant, of trading with the Indians in all such parts of North America as aforesaid (except as hereinafter mentioned); . . . . .

But we do hereby declare, that nothing in this our grant contained, shall be deemed or construed to authorize the said Governor and Company, or their successors, or any persons in their employ, to claim or exercise any trade with the Indians on the north-west coast of America to the westward of the Stony Mountains, to the prejudice or exclusion of any the subjects of any foreign states, who, under or by force of any convention for the time being between us and such foreign states, respectively, may be entitled to, and shall be engaged in the same trade.

"Provided, nevertheless, and we do hereby declare our pleasure to be, that nothing herein contained shall extend or be construed to prevent the establishment by us, our heirs or successors, within the territories aforesaid, or any of them, of any colony or colonies, province or provinces, or for annexing any part of the aforesaid territories to any existing colony or colonies to us, in right of our Imperial Crown, belonging, or for constituting any such form of civil government as to us may seem meet, within any such colony or colonies, province or provinces:

"And we do hereby reserve to us, our heirs and successors, full power and authority to revoke these presents, or any part thereof, in so far as the same may embrace or extend to any of the territories aforesaid, which may hereafter be comprised within any colony or colonies, province or provinces as aforesaid:

"It being, nevertheless, hereby declared, that no British subjects other than and except the said Governor and Company, and their successors, and the persons authorized to carry on exclusive trade by them, shall trade with the Indians during the period of this our grant within the limits aforesaid, or within that part thereof which shall not be comprised within any such colony or province aforesaid."

† The Governor of the Hudson's Bay Company to the Colonial Secretary, 21st January, 1858. Sess. Paps. Can., 1858, Vol. 16, No. 3.

Lord ABERDARE.—That is enough for me; that goes far beyond the territory granted to Lord Selkirk.

Sir ROBERT COLLIER.—It goes further to the west.

Lord ABERDARE.—Therefore the Colonial Office at that time must have admitted that they had territorial rights in this country.

Mr. MOWAT.—But this is a letter from the Company to the Colonial Secretary.

Lord ABERDARE.—To the Colonial Secretary in answer to his letter, in which he suggests that there should be certain surrenders.

The LORD CHANCELLOR.—What is of more importance is Mr. Merivale's own letter, to which this is a reply, at page 222, in which he says, in the seventh paragraph:

"It is stated in the report"—the report that is referred to is that of a select committee of the House of Commons—"that the districts likely to be required for early occupation are those on the Red River and Saskatchewan. If that should be the case, the portion of territory thus generally indicated should be rendered free for annexation to Canada."

Lord ABERDARE.—Canada is there being treated as external to this country.

The LORD CHANCELLOR.—That is a report of a committee of the House of Commons, specially appointed to inquire into this matter, and certainly not in the special interests of the Hudson's Bay Company.

Mr. MOWAT.—But, my Lords, would that mean anything more than that that was part of what was claimed by the Hudson's Bay Company?

The LORD CHANCELLOR.—It was certainly not at that time part of Canada.

Lord ABERDARE.—It is treated as being external to Canada altogether.

Mr. MOWAT.—It would seem to be treated as being external to Canada; but it is an observation which might be made even if it was understood that it was a part in dispute, but whether in dispute or not that it should be annexed to Canada. There is nothing in the letter incompatible with the view that, upon a determination of the boundaries, these districts might be found to be within the limits of Canada; and the question of referring the boundary to the Judicial Committee for decision is actually discussed in the letter. Then if your Lordships take other passages you will find my construction made clear. For instance, take the letter of the Colonial Secretary to the Governor-General, at page 224, with which was transmitted the correspondence between the Colonial Office and the company already adverted to. We find him stating this:

"I do not propose to discuss the question of the validity of the claims of the company, in virtue of their charter, over the whole territory known as Rupert's Land."

Lord ABERDARE.—Over the whole territory?

Mr. MOWAT.—Yes:

"Her Majesty's Government have come to the conclusion that it would be impossible for them to institute proceedings with a view to raise this question before a legal tribunal, without departing from those principles of equity by which their conduct ought to be guided. If, therefore, it is to be raised at all, it must be by other parties on their own responsibility."

Lord ABERDARE.—But the very expression "the whole territory" assumes that a very large portion of the territory at any rate was their due. It would be very difficult to hold that that was to restrict them to a very small portion indeed—the immediate neighbourhood of their own trading forts.

Mr. MOWAT.—At all events, it seems clear, taking the whole of the correspondence, that the territorial rights of the company did not go down to what is in dispute between Manitoba and ourselves, which is 700 miles from the Bay.

The Lord Chancellor.—It is very important, because the Red River actually flows through Manitoba into Lake Winnipeg, does not it?

Mr. Mowat.—Yes.

Lord Aberdare.—And the Saskatchewan runs still further west.

The Lord Chancellor.—Yes. If at that time the Red River territory was not part of Canada, the inference of law is *prima facie* that Manitoba was not.

Mr. Mowat.—I think your Lordship will find that looking at the whole of the correspondence—which was not intended on the part of the British Government to admit the right of the Hudson's Bay Company, although sometimes expressions may be found to imply such admission if you look at these expressions alone—looking at the whole of the correspondence, I think your Lordships will come to a different conclusion.

The Lord Chancellor.—Does it not shew that they were not parts of Canada.?

Mr. Mowat.—No, I do not think that it does. I think, my Lord, that it is pretty clear—and I think I can satisfy your Lordship of that before I close my argument—that whatever was not Hudson's Bay territory was Canada.

The Lord Chancellor.—If this part was not occupied by the Company, and therefore not to be deemed Hudson's Bay territory, still it seems pretty clear that even so late as 1858 they were not parts of Canada.

Mr. Mowat.—There are expressions which imply that, but there are also other expressions in the correspondence against that assumption.

Lord Aberdare.—Expressions which imply it, which were made after the whole controversy had been fully raised, and with the view of procuring the cession of lands not required by the Hudson's Bay Company from England to Canada. Therefore they were expressions made with the whole view of the case fully before them. I think you may use the time between this and to morrow, not by fortifying arguments in favour of a possible extension of Canada into these remote regions, but by narrowing the question in some practicable way.

Mr. Mowat.—If your Lordship pleases.

Sir Robert Collier.—It would save a good deal of time, and a good deal of trouble to yourself, if you did that.

Mr. Mowat.—I will read a sentence or two more from that very same despatch from the Colonial Secretary to the Governor-General:

"With regard to the question of boundary, as distinguished from that of the validity of the charter, Her Majesty's Government are anxious to afford every facility towards its solution, a mode of accomplishing which is indicated in the correspondence, if such should be the desire of Canada."

And so on. At that time Canada was claiming all this territory.

Lord Aberdare.—No, no; I do not understand Canada as claiming these territories. The Canadian settlers wished to go into the country, which was said to be very rich, and from which they were excluded by the Hudson's Bay Company. I do not understand that they claimed it as a portion of Canada, but as a portion of the continent, which it was convenient, and perhaps right, that Canadian subjects should colonize.

Mr. Mowat.—It was claimed on that ground I agree, but it was also claimed on the ground of right at the same time. Both grounds are put forward. The facts with regard to the position of Canada in the matter were shortly these: The Hudson's Bay Company desired a renewal of its exclusive right of trading. Their existing license would expire in about a couple of years, and they wished to know beforehand whether there was likely to be a renewal of this license, which was over territory which did not belong to them under their charter. So that having an exclusive right to territory which was theirs, and a right of exclusive

trade in the territory which was not theirs, prevented any dispute arising, because the only value of either territory at that time was the trade. About two years before the expiration of the license they applied for its renewal. Then the Government here sent a despatch to the Governor-General informing him of this, and stating that the government here intended to bring the whole question before a committee of the House of Commons, in order that the position of the company, and all matters connected with it, might be investigated at the same time, and inviting the Government of Canada to take such course as they might think proper. Then, what position did the Government of Canada take upon that? I will refer your Lordships to a report of the Executive Council, dated 17th January, 1857, approved of by the Governor-General, in which the claim is stated in this form:

"The general feeling here is strongly that the western boundary of Canada extends to the Pacific Ocean."

This is at page 165.*

Then, in the address of the Canadian Parliament to Her Majesty, 13th August, 1858, which will be found at page 225† it is represented:

"That the approaching termination of the License of Trade granted by your Majesty's Imperial Government to the Hudson's Bay Company over the Indian territories, a portion of which, in our humble opinion, Canada has a right to claim as forming a part of her territory, renders imperative the adoption of such measures as may be necessary to give effect to the rights of the Province, and presents a favourable opportunity for obtaining a final decision on the validity of the charter of the Company and the boundary of Canada on the north and west."

Then, in another Order in Council, dated 18th February, 1864, printed at page 246,‡ it was declared that they claimed as part of Canada all the territory that was "in the possession of the French at the period of the cession, in 1763."

Lord ABERDARE.—That does not mean that they were entitled to claim all that to be a part of Canada which was ceded to England in 1763.

Mr. MOWAT.—The whole tenor of the correspondence I think shews what I contend for. Now, amongst other things, the Commissioner of Crown Lands of Canada, in whose Department the matter was, as long ago as 1857 made a report treating this territory as part of Canada, and therefore as part of Ontario. His report is at page 168.§

Lord ABERDARE.—Here again is this expression on page 223, with reference to the cession of the Red River and Saskatchewan districts:

"I trust that the ready acquiescence of the Hudson's Bay Company in the plan proposed for meeting the requirements of the Canadian government will be accepted as an earnest of their desire to be on terms of harmony and friendship with their countrymen in Canada."‖

That does not look like giving up Canadian territory so much as giving up land which was not wanted for other purposes.

Mr. MOWAT.—That is the way they chose to put it. The Hudson's Bay Company chose to put it in that way.

The LORD CHANCELLOR.—In the long report which begins at page 213,** there is a recital, at page 216, of a minute from the Governor in Council, that no immediate charge should be taken by Canada of any territory, in a form involving

* Order in Council, Canada, 17th January, 1857. Sess. Papers, Can., 1857, No. 17.

† Journals, Leg. Ass., Can., 1858, p. 1028.

‡ Sess. Papers, Can., 1864, No. 62.

§ Memorandum of the Hon. Joseph Cauchon. Sess. Papers, Can., 1857, Vol. 15, No. 17.

‖ The Governor of the Hudson's Bay Company to the Colonial Secretary, 21st January, 1858. Sess. Papers, Can., 1858, Vol. 16, No. 3.

** Final report of Chief Justice Draper, 1857. Sess. Papers, Can., 1858, Vol. 16, No. 3.

burdens for administration and defence, until the sanction of the Provincial Legislature was obtained, but they wanted certain things to be determined, and then that in the meantime the Chief Justice, who seems to have been accredited to England, should see,

"1st. That Canada should be secured the reversion of such territory, north and west of Lake Superior, as experience may shew to be fit for settlement, contingent on the opening of such communication from Canada as may prove sufficient to allow their future union with the Province. 2nd That immediate steps should be taken by Her Majesty's Government to prevent the absorption of the territory west of Lake Superior by unauthorized emigration from the United States. 3rd. That every facility should be secured for enabling Canada to explore and survey the territory between Lake Superior and the Rocky Mountains."

Then the Chief Justice reported, at the bottom of page 219, and at the top of page 220, as to the finding of the [Imperial] Parliamentary Committee this—

"The recommendation of the Report was in effect: 1st, That the Province should be free to annex to her territory, such portions of the land in her neighborhood as may be available to her for the purposes of settlement, with which lands she is willing to open and maintain communication, and for which she will provide the means of local administration. The districts on the Red River and the Saskatchewan are those particularly referred to—"

and so on. It looks very much as if this claim was an afterthought, instead of this territory being already part of Canada.

Mr. MOWAT.—I think I can prove the reverse of that. I can do so to some extent now, in the correspondence which we have been speaking about. Looking at the Joint Appendix, page 250, and some following pages, which I have marked for another purpose, there is there the report of the Hon. George Brown, President of the Executive Council at the time; that is, in 1865.* The first paragraph is:

"I have the honour to report that while recently in England, in compliance with Your Excellency's instructions, I placed myself in communication with Her Majesty's Secretary of State for the Colonies, on the subject of opening up to settlement the North-Western Territories."

Would your Lordships allow me to mention that there were two things constantly kept in mind. It was thought that it was a desirable thing that this territory, or portions of it, should be added to Canada if it did not belong to Canada, and then the other ground was, that it did belong to Canada, and that the Hudson's Bay Company had no right to keep it back. The passage which I wish to refer to at page 255 is this:

"In discussing with Mr. Cardwell these demands of the Hudson's Bay Company, I pointed out what appeared to me the utterly untenable character of their pretensions. I endeavoured to shew that they were seeking to sell to Her Majesty's Government for an enormous sum, territory to which they had no title under their charter, and I contended that if the solution of the quesiion was to be sought in the purchase of a portion of the Company's territorial claims, the first step was clearly to ascertain what validity there was in those claims what land the company really had to sell."

Those, and one or two other passages which I ask your Lordships' permission to read, should be remembered in connection with the fact that the Commissioner of Crown Lands of the Province of Canada, in 1857, made the elaborate report already referred to, arguing from first to last that the whole of that territory was part of Canada.

The LORD CHANCELLOR.—This passage does not say so or suggest it—the passage which you have just been commenting upon. It suggests very strongly

* Journals, Leg. Ass., Can., 1865, p. 48.

that the whole of the charter and the claim of the Hudson's Bay Company should be set aside, but not on the ground that the territory belonged to Canada.

Mr. MOWAT.—Is your Lordship referring to the passage which I read from Mr. Brown's report?

The LORD CHANCELLOR.—Yes, the passage you were just now reading.

Mr. MOWAT.—Well, my Lord, this language may be general, but the foundation of the whole thing, the first step which was taken after the Order in Council of 17th January, 1857, and the appointment of Chief Justice Draper as special agent to guard Canadian interests in connection with the proposed renewal of the Company's license, was Mr. Cauchon's report as Commissioner of Crown Lands, and he argued the matter from beginning to end; and as to the point that the Hudson's Bay Company owned no part of this territory, he takes as strong ground as anybody could take, as your Lordships will find.

Lord ABERDARE.—But first look at what occurs after that which you just now quoted. which is a statement on behalf of Canada. At page 257, Mr. Cardwell sums it up.* It is a communication from the Colonial Secretary to the Governor-General. It refers to a conference which took place between your Canadian Ministers, deputed to proceed to England to confer with Her Majesty's Government on the part of Canada, and the Duke of Somerset, Earl De Grey, Mr. Gladstone, and himself, on the part of Her Majesty's Government; and he says:

"On the fourth point, the subject of the North-West Territory, the Canadian Ministers desired that that territory should be made over to Canada, and undertook to negotiate with the Hudson's Bay Company for the determination of their rights, on condition that the indemnity, if any, should be paid by a loan to be raised by Canada under the Imperial guarantee. With the sanction of the cabinet, we assented to this proposal."

All that does not look as if it was an admission of the rights of Canada. It looks rather like an admission of the rights, qualified perhaps, of the Hudson's Bay Company, under which they were to make over to Canada a country external to Canada.

Mr. MOWAT.—But if your Lordship finds at the very start, and as the foundation of the whole thing, that the Government of Canada had a report prepared by their Commissioner—which is set forth at page 168, and is a very long document—maintaining the very contrary?

Lord ABERDARE.—Look again at this, the report of the Canadian delegates to England on the same page, 257.† These delegates, that is to say, Sir John Macdonald, Sir George Cartier, Mr. George Brown, and Mr. Galt (I think he was afterwards knighted) say:

"The important question of opening up to settlement and cultivation the vast British territories on the north-west borders of Canada next obtained the attention of the conference."

Mr. MOWAT.—But then, if you go on to observe towards the foot, it says:

"The claim of Canada was asserted to all that portion of Central British America which can be shewn to have been in the possession of the French at the period of the cession, in 1763."

The LORD CHANCELLOR.—That is another matter quite; at the present we have not that before us. It is not even evidence which you can offer on that subject. If it was so in the possession of the French as to be part of the territory admitted to be theirs, and ceded to the Crown after the war, then a strong argument could be founded. But that is not the ground, and I observe that in this same report of the Canadian delegates the minute of the Council approved

* Journals, Leg. Ass., Can., 1865, p. 13. † *Ib*, p. 9.

by the Governor was referred to, which speaks of the Government of Canada being ready to co-operate with the Imperial Government for the annexation to Canada of such portions of the territory as might be available for settlement. That is the tone of the correspondence at that time.

Mr. MOWAT.—Well, it is the tone of a portion of it, my Lord, but simultaneously with all that there is the claim to ownership. And as to the evidence of the French possession and ownership, the Appendices put in before your Lordships are largely taken up with it.

The LORD CHANCELLOR.—Claim to ownership of that which was in the recognized and lawful possession of the French I suppose at the time of the cession in 1763?

Mr. MOWAT.—Yes; and I hope to satisfy your Lordship that we are entitled to all that was in the possession of the French in 1763.

The LORD CHANCELLOR.—There are various sorts of possession. If the French possessed it as part of that territory which was acknowledged to be theirs, and which they conceded in 1763, then I think your argument would be strong upon that; but if they had gone merely as squatters into a territory not occupied by the Company, that would be quite a different thing.

Mr. MOWAT.—The Company's territories, whatever they may have been, were never defined; the charter itself is silent as to their extent; the adverse title of France to these districts is asserted by Charter, and by actual and sole possession, and by reason of contiguity; the Company did not set foot there until 1790, and then not by virtue of their charter, but of their right in common with all other British subjects; and as a matter of fact they found it already in the occupation of the North-West Company and of other such subjects, Canadian and English.

Since your Lordships are looking at expressions on one side, will you allow me to point out some on the other; at page 259 for instance, which is the report of the Committee of Council.* The paragraph commences:

"In the first place the committee do not admit that the company have a legal title to that portion of the North-Western territory which is fit for cultivation and settlement.

"This fertile tract is a belt of land stretching along the northern frontier of the United States to the base of the Rocky Mountains, and Canada has always disputed the title of the Company to it."

Then your Lordship will observe the other expressions connected with that.

Lord ABERDARE.—Just so:

"Even if it be admitted that the charter of 1670, recognized as it has been by several Imperial statutes, gives to the company a freehold right in the soil in Rupert's Land, Canada contends that the cultivable tract in question forms no part of that land."

Does not it carry the company's claim far beyond what you have limited it to? Even if you take it as excluding the right of the Hudson's Bay Company to the Saskatchewan and the Red River districts, it leaves their claim far greater than this which you have been arguing about.

Mr. MOWAT.—Perhaps I am arguing for a larger extent of territory than I need have presented to your Lordships; but this exception which is referred to here, would embrace all that is important for my present purpose, because the cultivable portion—

Sir ROBERT COLLIER.—We had better confine ourselves to what is important for your present purpose I think.

Mr. MOWAT.—I propose doing so—I will not go beyond that.

Lord ABERDARE.—The cultivable portion goes to the Red River and the Saskatchewan; and they would both be outside that portion of the country which was given to Ontario by the arbitrators.

* Order in Council, Canada, dated 22 June, 1866, Sess. Papers, Can., 1867-8, No. 19.

Mr. MOWAT.—Yes, beyond it. Your Lordship read the paragraph commencing—"Even if it be admitted that the charter of 1670—"

Lord ABERDARE.—I think that goes strongly against you.

Mr. MOWAT.—It meets the suggestion that the claim was admitted, because the contrary is asserted, so far as regards that portion.

Lord ABERDARE.—No, it only says that they do not admit it to be Hudson's Bay territory, but it does not necessarily admit that it was a portion of Canada ceded in 1763.

The LORD CHANCELLOR.—They say of the Hudson's Bay Company that, first of all, they are entitled to nothing, that their whole charter and privileges ought to be swept away, but at all events they say they have not a good title to this territory.

Lord ABERDARE.—And that it ought to be annexed to Canada and made over to Canada, all which seems to shew that it was not part of Canada.

Mr. MOWAT.—The Act of 1774 gave us all the territory bounded on the north by the Hudson's Bay territory. It does not exclude any portion of the territory of Great Britain.

Lord ABERDARE.—That evidently means up to the line of the Lake of the Woods. They do not go beyond the Lake of the Woods. It was unknown to them. We must take the line of the head waters of the Mississippi, and that strengthens your argument very much, in my opinion, in favour of the line which is along the Mississippi and Ohio.

Mr. MOWAT.—Yes, I see the force of that, my Lord.

[*Adjourned to to-morrow.*]

SECOND DAY.

WEDNESDAY, July 16th, 1884.

Mr. MOWAT.—May it please your Lordships, the point which is now before your Lordships is the second question in the Special Case, which is expressed there in these words:

"In case the award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said Provinces."

The position which the Province of Ontario has taken with reference to the award, shews your Lordships that Ontario was satisfied on the whole with the boundaries which the award provided for her. So far as regards the western boundary, the award assigned as our western boundary, a line drawn from the north-west angle of the Lake of the Woods northward to English River. That, according to the award, is the boundary between the two provinces.

The LORD CHANCELLOR.—Anything further north (which is in a different colour on the map) is outside the boundary which the award has given you.

Sir MONTAGUE SMITH.—The part shewn by the diagonal lines.

The LORD PRESIDENT.—This red line is the award boundary.

Lord ABERDARE.—May I ask a question before you go further. Canada consists of seven Provinces and I think of four Districts?

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—And then, besides that, there is a great country not provided for, called the North-West Territories.

Mr. MOWAT.—Yes, my Lord; but that general designation covers also the districts.

Lord ABERDARE.—By what authority were those districts formed?

Mr. MOWAT.—They were formed by the authority of the Dominion. They are not provinces. They have not the power or jurisdiction of provinces: there is a Lieutenant-Governor of the North-West Territories, and a Council, with limited powers, whose jurisdiction extends over the districts. It was found convenient to set apart certain portions of the territory and to give the names which your Lordships have been informed of.

Lord ABERDARE.—I see them there, Assiniboia, Saskatchewan, Athabasca, and so forth. Were those constituted by an Order in Council, or by an Act of Parliament?

Mr. MOWAT.—By an Order in Council, my Lord.

Lord ABERDARE.—Then all this additional part that was not within the award of the arbitrators was carved as it were out of the Dominion. Indeed the whole of it may be supposed to be carved out of the Dominion and part of it was made the Province of Manitoba. Was that done by an Order in Council?

Mr. MOWAT.—No, that was done by an Act of the Dominion Parliament*.

Sir MONTAGUE SMITH.—Under the British North America Act, 1867.

Sir ROBERT COLLIER.—In pursuance of a power given by the British North America Act.

Sir BARNES PEACOCK.—The boundary of Manitoba was first laid down by an Act of the Dominion. Then the Minister of Justice thought there was an objection to that Act, and thought it was out of the powers of the Canadian Parliament, and he recommended that an application should be made to the Parliament here to pass an Act to make the Dominion Act valid.

Mr. MOWAT.—That was so.

Sir BARNES PEACOCK.—That was done by the British North America Act, 1871?

Mr. MOWAT.—Yes. There had been previous discussions on the subject. There was a discussion in the Canadian House of Commons with reference to whether the Dominion Parliament had a right to pass the first Act with reference to Manitoba. The Imperial Act was not merely a suggestion afterwards of the Minister of Justice, but was the result of the discussions.

Sir BARNES PEACOCK.—He reported upon it that the Dominion Act had been passed, and recommended that an application should be made to the Imperial Parliament to pass an Act to render that Act valid; and that was done by the British North America Act, 1871.

Mr. MOWAT.—Yes, and then that Act further provided that changes might be made in the boundaries of any province by the Dominion Parliament thereafter, with the consent of the particular province affected.

Sir BARNES PEACOCK.—And not otherwise?

Mr. MOWAT.—Yes. The Dominion Parliament has no power otherwise with reference to existing provinces. Then the same Imperial Act gave to the Dominion Parliament power also to constitute new provinces out of the territory not yet formed into provinces. There are about two millions of square miles not yet formed into provinces.

Lord ABERDARE.—So far they have only formed Manitoba?

Mr. MOWAT.—That is the only one.

Lord ABERDARE.—And carved out four districts, which are awaiting adoption?

Mr. MOWAT.—Yes, and which may or may not be made provinces. When they are made provinces their boundaries may or may not be the same as the so-called districts. They have now no governor or separate organization as a province.

*33 Vict., cap. 3, (1870).

Sir MONTAGUE SMITH.—When you get northward to the English River, then does the award boundary follow that river eastward ?

Mr. MOWAT.—Yes. What we say is that the awarded territory was always part of our province. I had hoped (there is no harm perhaps in my saying so) that the whole question of the northern boundary might be presented now, but we could not arrange that with the Dominion Government, and it was arranged merely that the western boundary should come before your Lordships.

Sir ROBERT COLLIER.—That is the boundary between the two provinces, which I suppose is only the western boundary.

Mr. MOWAT.—Our western boundary.

Sir ROBERT COLLIER.—By the Act of 1881, by which Manitoba was finally constituted, their eastern boundary is your western boundary ?

Mr. MOWAT.—That is so.

Lord ABERDARE.—There is nothing about this limitation to the western boundary in the reference to us:

"In case the award is held not to settle the boundary in question, then what on the evidence is the true boundary between the said provinces?"

Mr. MOWAT.—That means of course between Ontario and Manitoba.

Sir ROBERT COLLIER.—But, as they only come in contact on the western side, it only involves the western boundary of Ontario.

Lord ABERDARE.—Manitoba would extend northward beyond the limits of the award of the arbitrators.

Mr. MOWAT.—The Dominion Act has given a territory to Manitoba beyond the awarded westerly boundary.

Lord ABERDARE.—It has given the piece coloured yellow—the portion north of the portion given by the award.

The LORD PRESIDENT.—The portion north of the red line, and of the English River?

Mr. MOWAT.—Yes; it is given to Manitoba conditionally. [*The learned counsel explained to their Lordships on the map.*]

The LORD CHANCELLOR.—If the Dominion has given that part which lies here [*pointing on the map*] to Manitoba, then the boundary between the two Provinces, supposing this [*pointing*] belongs to Ontario, must be traced here [*pointing to that portion of the awarded westerly boundary which runs along the English River, etc.*]

Mr. MOWAT.—At some time.

The LORD CHANCELLOR.—But on the face of this present reference, what is there to shew that that part of the boundary is not now to be determined ?

Mr. MOWAT.—If your Lordship takes that view of it, I am quite willing.

The LORD CHANCELLOR.—I do not see what limitation there is.

Mr. MOWAT.—I am not anxious that your Lordships should not decide that. All that I am saying this for now is that your Lordships may see what the question really is. I do not say so because I have any objection to the northern boundary—or that portion of our awarded western boundary which follows the water communications—being examined and adjudicated upon as well as the other. The first paragraph of the Special Case is this:

"The Province of Ontario claims that the westerly boundary of that Province is either (1) the meridian of the most north-westerly angle of the Lake of the Woods, as described in a certain award made on the 3rd August, 1878, by the Honourable Chief Justice Harrison, Sir Edward Thornton and Sir Francis Hincks, or (2) is a line west of that point."

That paragraph, therefore, refers merely to our westerly boundary. The next paragraph is:

"The Province of Manitoba claims that the boundary between that Province and the Province of Ontario is (1) the meridian of the confluence of the Ohio and Mississippi Rivers, or (2) is that portion of the height of land dividing the waters which flow into Hudson's Bay from those which empty into the valley of the Great Lakes, and lying to the west of the said meridian line."

Sir MONTAGUE SMITH.—The question refers to those two claims?

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—You are not prepared to limit your argument to the question as to whether the western boundary shall be the one taken from the Ohio, or shall be the line fixed by the arbitrators, that is, through the north-west angle of the Lake of the Woods?

Mr. MOWAT.—If your Lordships were to say that it was one or other of those two lines, I should be prepared to accept the latter.

Sir MONTAGUE SMITH.—You claim the line from the Lake of the Woods up to the English River?

Mr. MOWAT.—Yes, that is our claim according to the award.

Sir MONTAGUE SMITH.—The other line is to the eastward a great deal?

Mr. MOWAT.—Greatly to the eastward.

Sir MONTAGUE SMITH.—That difference is what seems to be really in dispute?

Lord ABERDARE.—It is for the counsel to decide. He does claim a great deal more.

Mr. MOWAT.—I thought I was driven to claim all that just argument would entitle me to claim, but if your Lordships say that the question is between those two lines, that ruling makes a great difference.

The LORD CHANCELLOR.—We cannot limit you to that, except by your own consent.

Lord ABERDARE.—If your argument prevails, the whole Province of Manitoba would be abolished.

Mr. MOWAT.—No, my Lord.

Sir ROBERT COLLIER.—The principal part of it.

Mr. MOWAT.— The addition made in 1881 would be abolished.

Sir ROBERT COLLIER.—The original part also.

Mr. MOWAT.—No; because the original has been the subject of an Imperial Act, which would override our claim if we had any.

Lord ABERDARE.—Up to the limits at that time?

Mr. MOWAT.—In respect of the first limits of Manitoba.

Lord ABERDARE.—Which is comprised within the orange line [*referring to the map*]?

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—How would it be as to the remaining part, coloured yellow?

Mr. MOWAT.—That was the part that was added, so far as the Dominion Parliament could add it, to Manitoba by the subsequent Act of the Dominion.

Lord ABERDARE.—You do not question that—or do you question that?

Mr. MOWAT.—There is one view of the matter in which it is questioned.

Lord ABERDARE.—Then, if your argument entirely prevailed, the Province of Manitoba would be limited to that very small portion of it which is contained within the orange line?

Mr. MOWAT.—Yes. Would your Lordships allow me a minute to consult with my associates? Your Lordships are putting a suggestion to me that I have not considered, and I should like to consult with them as to whether we should confine ourselves to the awarded line.

Sir ROBERT COLLIER.—Very well. You had better make up your mind whether you do that or not.

[*The learned counsel for Ontario consulted together for a short time.*]

The LORD CHANCELLOR.—Mr. Attorney-General, what you have lately said has directed my attention to the Dominion Act of 1870, which did form the original Province of Manitoba, and which was confirmed as you say by an Imperial Act.

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—On the face of that, it appears, as distinctly as words can express the thing, that even the small province, the original Manitoba, is carved out of Rupert's Land, and was not part of Canada.

Mr. MOWAT.—Out of Rupert's Land and the North-Western Territory, my Lord; besides, what the Dominion chooses to say in its statutes cannot take away the right of a province, or establish the right.

The LORD CHANCELLOR.—I do not follow you. What stronger evidence of the fact can there be than two Acts, one of the Dominion, and the other of the Imperial Parliament, that this territory was Rupert's Land and not Canada. I am only speaking of the small Manitoba.

Mr. MOWAT.—By the Dominion Act* it is enacted that this province shall be formed out of "Rupert's Land and the North-Western Territory," not out of "Rupert's Land" alone. Rupert's Land was claimed by the company under their charter, but to the North-Western Territory the company made no pretence of claim whatever. The one and the other had been transferred by Her Majesty to the Dominion without specification of the boundaries of either. Moreover, the Act shews that whatever the southerly limit of Rupert's Land may be, it did not extend as far southward as the international boundary, for the Act declares that the parallel of 49 "forms a portion of the boundary line between the United States of America and the said North-Western Territory"—not between the United States and Rupert's Land. The Imperial Act† confirms, in terms, the Dominion Act, but does not use the name Rupert's Land in that connection.

The Lord CHANCELLOR.—Plainly on the very face of it, it shews that in the view of the legislature which passed that statute, it was previously territory forming part of the Union or Dominion of Canada, but not included in any Province thereof.

The LORD PRESIDENT.—The Dominion Act, section 35, goes on:

"With respect to such portion of Rupert's Land and the North-Western Territory as is not included in the Province of Manitoba."

The LORD CHANCELLOR.—Surely to argue against that Act, confirmed by an Imperial Act, is a bold undertaking.

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* DOMINION ACT, 33 VICT., CAP. 3, SEC. 1, (1870).

1. On, from and after the day upon which the Queen, by and with the advice and consent of Her Majesty's Most Honourable Privy Council, under the authority of the 146th section of the "British North America Act, 1867," shall, by Order in Council in that behalf, admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba, and be bounded as follows: that is to say, commencing at the point where the meridian of ninety-six degrees west longitude from Greenwich intersects the parallel of forty-nine degrees north latitude; thence due west along the said parallel of forty-nine degrees north latitude (which forms a portion of the boundary line between the United States of America and the said North-Western Territory) to the meridian of ninety-nine degrees of west longitude; thence due north along the said meridian of ninety-nine degrees west longitude, to the intersection of the same with the parallel of fifty degrees and thirty minutes north latitude; thence due east along the said parallel of fifty degrees and thirty minutes north latitude to its intersection with the before-mentioned meridian of ninety-six degrees west longitude; thence due south along the said meridian of ninety-six degrees west longitude to the place of beginning.

† For the Imperial Act, see *ante*, p. 22, note.

Mr. MOWAT.—I would submit one or two observations upon that to your Lordships. Take the two Acts separately, if your Lordships please. In the first place take the Dominion Act, which describes this territory in the way I have mentioned. I submit that if the matter had stood alone on that statute, without having the Imperial Act afterwards, the Dominion Act could not have affected the province.

The LORD CHANCELLOR.—You may say it would have been *ultra vires* if the facts were otherwise.

Mr. MOWAT.—That is it, my Lord.

The LORD CHANCELLOR.—But being confirmed by an Imperial Act, you can no longer say it is *ultra vires*.

Mr. MOWAT.—Then what I submit is this, that all the Imperial Act does is to confirm the effect of the Dominion Act.

The LORD CHANCELLOR.—Surely that is special pleading.

Mr. MOWAT.—I shall be sorry if your Lordship takes that view of it. The Province of Ontario at that time had not, and has not now, any objection to this original territory so given to Manitoba forming a separate province.

The LORD CHANCELLOR.—But what stronger evidence can there be than these Acts of Parliament, and this is a question of evidence?

Sir MONTAGUE SMITH.—Have you come to any resolution with reference to the question suggested to you?

Mr. MOWAT.—Yes, my Lord. I may say we are content with the awarded boundaries. But I should add, that in order to shew we are entitled to the awarded boundaries, I may have to lay before your Lordships an argument which would shew we are entitled to more; but while the argument would shew we are entitled to more I claim no more.

Sir MONTAGUE SMITH.—I quite understood from the first that your argument might lead to a larger claim than that; and you do not wish to be precluded from the argument, as far as it is good, on this narrower claim.

Mr. MOWAT.—Yes, my Lord, that is exactly the position I want to take.

Sir MONTAGUE SMITH.—You do not want it to be objected to that the argument is bad altogether because it is too large.

Mr. MOWAT.—Yes, my Lord.

Sir MONTAGUE SMITH.—Now, about the westerly boundary. Was anything more intended to be referred to England? Your two claims are mentioned in the Special Case, which is the authority under which we are now acting, as far as consent goes to it, and then you say it has been agreed to refer the matter to the Judicial Committee. The only matter mentioned in the case is those two claims.

Lord ABERDARE.—We must go beyond that. Supposing it should turn out that we took the same view that the arbitrators did, and considered this [*pointing on the map to the tract striped with yellow and red crosswise*] a portion of Upper Canada and Ontario, and at the same time we were of opinion that what remained of the Province of Manitoba to the north of this place should continue in the Province of Manitoba, we should then be dealing with other than the westerly boundary.

Sir MONTAGUE SMITH.—The settling the westerly boundary may indirectly involve the northerly boundary.

Lord ABERDARE.—Not the northerly boundary, but this portion of the Province of Manitoba to the north.

Mr. MOWAT.—I do not make the slightest objection to that view.

The LORD PRESIDENT.—It would leave all this in the present legal condition, whatever it is.

Mr. MOWAT.—Yes, my Lord.

Sir MONTAGUE SMITH.—Of course every word of this Special Case was very much studied and considered before it was settled?

Mr. MOWAT.—Yes, my Lord. It concerns, no doubt, only that western boundary. The other may be incident to that, and necessarily involved in it when you are considering the westerly boundary. As I have said, I have not the least objection to that construction being put upon it. I want to get the matter decided.

Sir ROBERT COLLIER.—If you look at the claims of both sides, they are claims to and on certain lines. They assume the northern line to be drawn, and the question is whether the westerly boundary is to go to the one line or to the other. If you look at the first and second, paragraphs you see Manitoba claims that the boundary of that province is the meridian of the confluence of the Ohio and Mississippi rivers, or, as an alternative, that portion of the height of land lying to the west of the said meridian line. That is all it claims. It does not say anything about the northern boundary. It claims that that is the boundary, and that that is is where the province is to be taken to end.

Lord ABERDARE.—And Manitoba claims to go down to the international boundary.

Sir MONTAGUE SMITH.—They are two quite distinct claims, and they are both intelligible on the map. It looks as if it was intended we should decide between those two claims.

Mr. MOWAT.—Well, my Lord, I am quite content with that construction; we want to know what our boundaries are.

Lord ABERDARE.—If we decide that this is the line [*pointing on the map to the awarded line*] we do not hand this [*pointing to the tract with yellow stripes*] over to Ontario

Mr. MOWAT.—Yes, that would be the effect of it. Then, bearing upon that point, I would remind your Lordships of the commission to Sir Guy Carleton, which describes our southerly line up to the most north-western point of the Lake of the Woods. It goes through the height of land and reaches the most north-western point of the Lake of the Woods.

Lord ABERDARE.—What is the page you are on?

Mr. MOWAT.—It is page 387, my Lord.*

Lord ABERDARE.—This is the first commission after the settlement with the United States.

Mr. MOWAT.—Yes, my Lord. It describes the province then as comprehending "all our territories, islands and countries in North America bounded on the south" and so on. One need not read the beginning of that until we get to Lake Superior, which is at line 10:

"Thence through Lake Superior, northward of the Isles Royal and Phillipeaux, to the Long Lake; thence through the middle of said Long Lake and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most north-western point thereof, and from thence on a due west course to the River Mississippi."

Lord ABERDARE.—The Long Lake is a series of lakes.

Mr. MOWAT.—Yes, it is a series of lakes.† The height of land has to be crossed in reaching Lake Superior from the Lake of the Woods. The height of land runs between them.

Then by the express terms of that commission we get to the most north-western point of the Lake of the Woods, which is north of the height of land.

* The commission of 1786, printed *ante*, p. 44, note.

† Variously represented on the old maps as connected with Lake Superior by an inlet corresponding in position to the estuary of the Pigeon or of the Kamanistiquia river.

There will be no dispute that that is north of the height of land. We have that point ascertained then in that way.

The LORD PRESIDENT.—According to your present argument, you do not care about "on a due west course to the River Mississippi."

Mr. MOWAT.—No, my Lord, it is not material; but I may argue that point in order to shew what territory I think, as a matter of strict law, the province may be said to be entitled to. Though this may shew a larger territory than is awarded, I do not claim a larger territory.

It is no doubt a matter of considerable difficulty to determine where the true boundaries are, having reference to the charter, and to the various statutes, and all that has taken place. There are considerations, no doubt of considerable weight, in favour of very different views. The charter itself is extremely vague. One can hardly imagine anything more so. It is just possible that it may be thought to be a matter which one cannot come to any conclusion upon; one of those matters which must be the subject of some arbitrary determination, either by a higher authority than the provinces themselves, or by arbitration. But I will assume that it can be made out what the legal boundaries are, and I wish to present a few considerations to your Lordships to shew what they are.

The great difficulty in the case is as to what is to be considered as "territory granted to the" Hudson's Bay Company. I think your Lordships would not find much difficulty in coming to the conclusion that all British Canada, north of the southerly line which is described in the Act of 1774, was intended to be included in Quebec, if it were not for that reference to "the territory granted to the" Hudson's Bay Company. But we have that expression there—the territory is only to go northward to the territory of the Hudson's Bay Company, and therefore we have to find out what that territory was. Now, what is to be considered as included in that expression, "the territory granted to the" Hudson's Bay Company—and for my purpose I wish to limit the construction of those words as much as possible? I wish to make as limited as possible the territory which can be considered to have been granted to the Hudson's Bay Company, in order that it may not be so considerable as to include territory which I claim on behalf of the Province of Ontario. I urged yesterday that the construction of those words, "the territory granted to the" Hudson's Bay Company, should be the legal construction, because we are now engaged on a question of law, and that the territory referred to should be territory effectually granted—not what the instrument purported to grant merely, if there is a difference between what it purports to grant and what it actually grants.

What the legislature was contemplating was the territory which had actually passed from His Majesty to the Hudson's Bay Company, and I pointed out the reason why that must have been the object in view. Perhaps I use too strong an expression when I say "must have been," but I will say, the reason which makes it almost certain, if not quite certain, to have been the object in view. The Hudson's Bay Company had powers of government. It was not necessary, therefore, whatever territories were included in their charter, to provide any government for them, because that was done already by the charter itself. What Parliament was doing was providing a government for portions which had no government before—for the territory which formerly belonged to France, which had been ceded in 1763, which before had been governed under French law and under a French Governor, and which now needed provision for government under English law and by an English Governor. I do not think your Lordships would hold that it was intended to leave out any part of British North America, north of the southerly line, from the government. If it was reasonable, as of course it was, that whatever territory the Hudson's Bay Company had

should be governed, namely, by the company, so also it was reasonable, right and necessary that the rest of the territory should be governed. I submit therefore that that single consideration, if there was reasonable doubt about the point, shews that the words ought to be construed as "effectually granted;" that they ought to be construed as meaning the territory belonging to the Hudson's Bay Company, the lands which they had the power of disposing of, and in which they had the jurisdiction to govern, and legislate, and so on, in accordance with the terms of the charter.

Then, what territory of the Hudson's Bay Company stood in that position? The charter, I have said, is extremely vague and indefinite, and what I submit is, that upon the reasonableness of the thing, upon the practice with regard to all similar charters of that period, and upon principles applicable also to other cases—in construing this charter for the present purpose, in determining what ought to be considered as having been effectually granted to the Hudson's Bay Company, we are to look at what was done under it, and at what land was appropriated under it, by the Hudson's Bay Company, and that the charter cannot be said to have granted any more than was so appropriated. There is a difficulty in saying exactly what was appropriated; a difficulty in point of law. There is no difficulty with regard to the facts. There is no difficulty in ascertaining how much territory the company actually occupied, or how much territory they exercised control over as proprietors, but then how much additional territory that might give is a matter of more or less difficulty. I may mention one or two things here in connection with other charters of the same period and founded upon the same principle.

The Lord Chancellor.—I do not see how that can have any bearing on the question which we have to determine. I cannot conceive how other charters not relating to this territory can have any bearing on the question which we have to determine.

Mr. Mowat.—I do not mean that the words of the other charters would have any bearing, but would not the view that was taken of those other charters, so far as they are analogous to this one, be material?

The Lord Chancellor.—If you shew that upon any bounding words of description, like those we have to deal with, applicable to other charters, a particular construction has been put, I do not say that may not be in point. If you prove that a particular territory being said to be bounded by lands granted to a certain company, has been held to be not applicable to the lands *de facto* granted so as to introduce an inquiry as to how far it was a valid grant or not, perhaps it may have some bearing upon the case. If you merely want to shew that in a question as to the validity of a charter something may have depended upon what was done under it, I think that has nothing to do with the present question.

Mr. Mowat.—I am not arguing as to the validity of the charter. I am assuming that it was perfectly valid, and merely inquiring how far it extended, and how much it can be said to have included.

The Lord Chancellor.—That is a question of parcels upon the construction of the charter.

Mr. Mowat.—Yes, my Lord, it is; but it seems, my Lord, to be material here to know what the parcels were that can be considered to have passed under the charter.

The Lord Chancellor.—But how you can shew that by shewing that the parcels were under another charter I do not know.

Mr. Mowat.—I will not urge this point further against your Lordship's impression; but it seems to me important that if we find charters as strongly expressed as this, and perhaps more strongly expressed than this, with regard to

the territories to be embraced in them, for instance definitely naming the particular latitudes, and perhaps naming the particular points between which the territory granted lay—if it was found that charters so expressed, relating to the undiscovered parts of America, have been always treated as if they merely carried to the grantees, not the whole of the territory, unconditionally, between those latitudes or points, but so much of that territory only as they acquired the sovereignty of for England, from whom the charters emanated, I think that might be material. It is only in that view that I wished to refer to these charters.

The Lord Chancellor.—For the present moment you may assume that the grant to the Hudson's Bay Company was *ab initio* entirely void, and that they had nothing whatever effectually granted. *De facto* various things were done on the footing of this being a grant alleged to be valid, and amongst other things done is this description.

Sir Montague Smith.—If I understand, you want to shew that the grant is only (I do not say whether it is right or wrong) effectual so far as they carried it into some operation by occupying the country and so on?

Mr. Mowat.—Yes, my Lord. This was not territory that was then English. It did not then belong to England. It was vacant territory—this is not a matter, I suppose, that can be disputed—which any nation might appropriate, if they took the proper steps for the purpose, on the principles of international law governing such matters; and territory of that sort having been granted by this charter to the Hudson's Bay Company, the effect of the charter is, I submit, limited in the way I have mentioned.

The Lord Chancellor.—It may well be so as to the effect of the charters. That is a very important question, which, as we know, was for many years under discussion by various parties, as to the Hudson's Bay Company and their rights. What I cannot understand is its bearing upon the boundary description which we have to deal with. It is not whether the territory was effectually granted or not, but whether it was *de facto* granted under a boundary description.

Mr. Mowat.—Of course, if your Lordships hold that, I cannot proceed with this part of the argument.

The Lord Chancellor.—What would be the use of bounding descriptions, if they are to let people into indefinite inquiries as to various facts and law which can be no assistance whatever in ascertaining the boundary?

Mr. Mowat.—But your Lordship sees that even taking the other view as to the meaning of the charter, it then would be extremely difficult to make out. I suppose we should differ about it—as to how far the charter would grant anything. It grants all the lands and territories on the confines of the Bay, and so on—what does that mean? There would be great doubt then, and you cannot get free of the doubt.

The Lord Chancellor.—You have got the Dominion Act of 1870, confirmed by an Act of the Imperial Parliament, which seems to me entirely to relieve that doubt if there were any, shewing that Rupert's Land included the present Manitoba, and was recognized as doing so both by the Dominion and by the Imperial Parliament.

Mr. Mowat.—Of course if your Lordships hold that I must bow to that view. But I have already pointed out that the statement in the Dominion Act is that Manitoba was formed out of "Rupert's Land and the North-Western Territory," not Rupert's Land alone, and that there had been no definition of the boundaries of either tract. But I am prepared to shew, beyond any doubt I think, unless your Lordships hold it to be immaterial, that a large territory there—all that I care about of course is the territory I am really claiming, but I am prepared

shew that a large territory beyond that, and therefore necessarily including that—was French territory.

Sir MONTAGUE SMITH.—It would be an assistance if you shewed that that would be excluded from the grant, because that is another matter altogether.

Mr. MOWAT.—Very well, my Lord, I can shew that. I do not say that it is clear that the whole of this was French territory, at the moment of the charter being granted in 1670, but it was French territory at the time it was ceded to England.

The LORD CHANCELLOR.—If you prove it was French territory ceded to England in 1763, that may be material.

Sir MONTAGUE SMITH.—That is the limit the charter itself gives; it is not to include what belongs, say, to the French.

Mr. MOWAT.—No, my Lord.

Sir BARNES PEACOCK.—Would it not be important on that to shew that Ontario has exercised jurisdiction over it as representing the French territory? For instance, there is a census to be taken every ten years. Have you ever taken the census in that part which you now claim as belonging to Ontario?

Sir MONTAGUE SMITH.—Mr. Mowat is going back long before that.

The LORD CHANCELLOR.—To make it out to be French territory ceded after the war, you would have to prove, first of all, that there were not merely some French people within the territory who may have established forts, but that it was a part of the French dominion of Canada, and then, secondly, if that be not clearly established, the question of what has been so treated afterwards would be exceedingly material.

Mr. MOWAT.—With regard to the matter of the census, I may say that the census to which his Lordship Sir Barnes Peacock referred is taken by the Dominion.

Sir ROBERT COLLIER.—That is at a later date.

Sir BARNES PEACOCK.—Has the census ever been taken for Ontario in this territory which you now claim?

Mr. MOWAT.—We have no jurisdiction about taking the census. Under the British North America Act, the provision is made that amongst the exclusive powers of the Dominion is the power of taking the census.

Sir BARNES PEACOCK.—But have your judicial officers ever exercised jurisdiction for this part of the territory before the surrender by the Hudson's Bay Company?

Mr. MOWAT.—Yes, I can shew that.

Lord ABERDARE.—There was a decision of a criminal case, I think, by them?

Sir ROBERT COLLIER.—We shall come to that. We are now on whether it was French territory in 1763. That is the present question.

Mr. MOWAT.—There is a great deal of historical matter bearing upon that. I will not trouble your Lordships with more than a portion of it, but sufficient, I think, for the present purpose.

Perhaps I had better first refer to what Governor Carleton says on the subject, in one of his despatches, dated at Quebec, 2nd March, 1768. It is at page 609, my Lords, of the Joint Appendix. I will read a little from that despatch, commencing at the beginning. Your Lordships will observe that it is addressed to the Earl of Shelburne:

"I have received your Lordship's letter of the 14th November, and one since, wrote from the office by your directions, dated the 8th of October last.

"The drawing hereto annexed is taken from different maps and the best memoirs and relations I have hitherto been able to procure. 'Tis intended chiefly to shew the western posts which the French formerly occupied, and how far they extend beyond Michilimakinac.

This end I believe it answers tolerably well, tho' their exact positions on the globe must be erroneous, as I have not met with any of those gentlemen who understand the use of any mathematical instrument, but they all agree that Pascoyat"—that is one of the forts on the Saskatchewan—"is two and a half or three months' journey beyond Michilimakinac, and reckon the distance about nine hundred leagues."

Lord ABERDARE.—Where is Michilimakinac?

Mr. MOWAT.—Your Lordship will see it marked on the map, between Lake Huron and Lake Michigan.

Lord ABERDARE.—It is the fort at the northern portion of that territory which runs between Lake Huron and Lake Michigan.

Mr. MOWAT.—The despatch proceeds:

"The river on which Pascoyat stands is said to be five hundred leagues long. A fort was erected one hundred leagues beyond Pascoyat, but I have not information enough to put either the fort or the full extent of the river in the map."

He writes therefore of two French forts there, on the Saskatchewan:

"The annexed return of the French posts, of the troops for the protection of trade, with the number of canoes sent up in the year 1754, shews in some measure the extent of their trade, and the system pursued by the French government in Indian affairs."

Your Lordships will observe here that it is the government who managed all these matters, that they are not matters of private enterprise unconnected with the government, but, throughout, the government takes an active part in them all—in sanctioning the trading with the Indians, and in erecting posts, and so on:

"They did not depend on the number of troops, but on the discretion of their officers, who learned the language of the natives, acted as magistrates, compelled the traders to deal equitably, and distributed the King's presents."

So there was government: there were troops to whatever extent was found necessary; and then the officers at each post were authorized to act, and did act, as magistrates, and so on:

"By this conduct they avoided giving jealousy and gained the affections of an ignorant, credulous and brave people, whose ruling passions are independence, gratitude, and revenge, with an unconquerable love of strong drink, which must prove destructive to them and the fur trade, if permitted to be sent among them; thus managing them by address where force could not avail, they reconciled them to their troops, and by degrees strengthened the posts of Niagara, Detroit and Michilimakinac without giving offence."

The next paragraph is:

"The country was divided into certain districts, and the only restraints laid on the traders were, first, not to go beyond the bounds of that district they obtained passes for"—passes, that is, from the Governor of Canada—"and, secondly, not to carry more spirituous liquors than was necessary for their own use, nor sell any of that to the Indians; the King's posts, or rather the Intendant's, were the only ones excepted from this general rule."

There was a great advantage in dealing with the Indians if they brought liquor into use, and while private persons were not allowed that advantage, it seems that at the King's posts the advantage was permitted:

"Under these regulations the canoes went first to the post of the district, from whence they had full liberty to go among the Indians and accompany them to their hunting grounds; they likewise called on their return. If any were ill-treated they complained to the commandant, who assembled the chiefs, and procured redress; the savages also made their complaints and obtained immediate satisfaction, an exact report of all which was sent to the governor. This return may be depended on for so much as it contains"—the particulars are given afterwards—"but as the King of France was greatly concerned in all this trade, a corrupt administration did not think it their interest that all these matters should appear in a full, clear and lasting manner.

"Your Lordship will be pleased to observe that the great inlets to the north-east, from the Missisipi, are by the Ohio, and from thence up the Ouabach, which leads towards the sources of the River Miamis and Lake Erie; by the Illinois, that leads to Fort St. Joseph and Lake Michigan; and the Ouisconcing, that leads to Fox River and Bay des Puans; besides these, the different streams that run into the Missisipi carry them towards Lake Superior and the western lakes."

Then what follows in the next paragraph has reference to the places on the east bank of the Mississippi, which I suppose your Lordships would think was clear, and perhaps it is not worth while troubling your Lordships with that.*

The LORD CHANCELLOR.—The only observation which occurs to me on that next passage is, that the French or Spaniards were there, but I suppose nobody contends that the Spaniards had any territorial dominion there. It plainly says that the settlements or posts spoken of are not necessarily such as to imply the assumption of territorial dominion. But as to the meaning of this description, you were referring to this document apparently to shew that the French extended their territorial acquisitions so as to include Pascoyat on the Saskatchewan.

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—Then all I point out is that the contents shew that settlements or posts of a kind not involving territorial dominion are apparently in contemplation.

The LORD PRESIDENT.—There is a reference to the King's territory at the bottom of the page.

The LORD CHANCELLOR.—That is of course important as distinguishing the King's territory—which probably would be Canada—from all these outlying places.

Lord ABERDARE.—It seems to contemplate a connection between what is called generally Louisiana and this district, rather than a connection between Canada and this district.

Mr. MOWAT.—I shall trouble your Lordships with a short selection only from the voluminous evidence about the settlement of the French there, and about Canada extending to the Mississippi.

Lord ABERDARE.—If you are not going to insist on this part of it, I suppose you might pass very lightly indeed over it.

Mr. MOWAT.—It was merely with the single purpose which I have spoken of already, to shew that the territory which may be excepted from our claim ought at all events to be considered as not extending so far as to exclude us from the points which the arbitrators thought we were entitled to.

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* The two paragraphs of the despatch next succeeding the paragraph here referred to are as follows:

"I shall easily find in the troops here many officers and men very ready to undertake to explore any part of this continent, who require no further encouragement than to be told such service will be acceptable to the King, and if properly executed will recommend them to his favour: but as they are unacquainted with the country, the Indian languages and manners, 'tis necessary to join with them some Canadians to serve as guides and interpreters. The gentlemen here are mostly poor, and have families: in order to induce them to attach themselves thoroughly to the King's interests, 'tis necessary they should be assured of their being taken into his service for life, and in case they perish on these expeditions, that their widows will enjoy their pay, to support and educate their children.

"Should his majesty think proper to allow the traders to go up to the western lakes, as formerly, I think a party might winter in one of these posts, set out early in the spring for the Pacific Ocean, find out a good port, take its latitude, longitude, and describe it so accurately as to enable our ships from the East Indies to find it out with ease, and then return the year following. Your Lordship will readily perceive the advantage of such discoveries, and how difficult attempts to explore unknown parts must prove to the English, unless we avail ourselves of the knowledge of the Canadians, who are well acquainted with the country, the language and manners of the natives." * * * * * *

Appended to the despatch is the return therein referred to, headed, "List of the Upper Posts under the French Government, of the Garrisons thereat posted, and of the number of Canoes usually sent up every year." Among the enumerated posts are Detroit and dependencies, Missilimakinac and dependencies, La Baye and dependencies, Illinois, Temiscamingue, Chagouamigon, Nipigon, Gamanastigouia, Michipicoton, and Mer du Ouest. The last of these—the Post of the Western Sea—comprised the country extending from the western watershed of Lake Superior to the Rocky Mountains, and from the Missouri to the northern watershed of the Saskatchewan; with numerous forts established therein.

The LORD CHANCELLOR.—This certainly shews that in 1768, according to the information which the government had obtained, the French had posts extending as far north as Pascoyat. More than that it does not seem to me to shew. Those were posts apparently for the purposes of trade, where they had their factors, and their factories, and a certain amount of jurisdiction and authority.

Mr. MOWAT.—I do not know of any other way of acquiring sovereignty over such territory. That is the only way in which it was done.

The LORD CHANCELLOR.—That state of things is no proof whatever of the acquisition of territorial dominion.

Mr. MOWAT.—The whole must be taken together.

The LORD CHANCELLOR.—Yes; if you have other instances, that may be material.

Mr. MOWAT.—I do not rely upon that solely, but it is one piece of evidence shewing that in this North-West territory there were French traders and French posts. It appears from the evidence that licenses to trade were necessary, and that the licenses to trade were granted by the Governor of Canada. The French king also sent troops to these various posts, and appointed magistrates there.

The LORD CHANCELLOR.—It does not appear that the magistrates were placed over anything but the factories and so on. I mean there is no reason at all to imagine that he treated the Indians as his subjects.

Mr. MOWAT.—May I ask your Lordship to permit me to call your attention to the account given by another of the English governors?

Sir MONTAGUE SMITH.—Yes, you are going on, as I understand, with your evidence.

Mr. MOWAT.—This is only another piece of my evidence; there is a great mass of it. I am merely picking out a few matters, because it would take a great deal of time to give to your Lordships the whole of the evidence, and I think it is only necessary to confirm in substance what I will read to your Lordships. I will read from the report of Governor Pownall, which you will find at page 601.* It is his account of what the French did in this territory, and I beg your Lordships' permission to observe that it was not a case of the English being there, or of the Hudson's Bay Company being there, and the French not being there. The Hudson's Bay Company never went into this region at all until long after the cession, when there was no doubt of the right of the English crown to it. This is what Governor Pownall says:

"The French in their first attempts to settle themselves in these parts endeavoured to penetrate by force of arms"—

Sir MONTAGUE SMITH.—All this was before the cession?

Mr. MOWAT.—Yes; shortly before the cession. There was no change in favour of the Hudson's Bay Company during the interval. The fact is, the French were increasing their occupation, every year more and more, of the territory which they had taken possession of, or acquired the sovereignty of, for their monarch. Governor Pownall says:

"The French, in their first attempts to settle themselves in these parts, endeavoured to penetrate by force of arms, to fix their possessions by military expeditions. But . . they fell afterwards into that only path into which the real spirit and nature of the service led. The native inhabitants (the Indians) of this country are all hunters; all the laws of nations they know or acknowledge are the laws of sporting; and the chief idea which they have of landed possessions is that of a hunt. The French settlers of Canada universally commenced hunters, and so insinuated themselves into a connection

* A Memorial stating the nature of the service in North America, and proposing a general plan of operations as founded thereon. Drawn up by order of, and presented to, His Royal Highness the Duke of Cumberland. 1756. 3rd ed. London: 1796.

with these natives. While the French kept themselves thus allied with the Indians as hunters, and communicated with them in, and strictly maintained all the laws and rights of sporting, the Indians did easily and readily admit them to a local landed possession, a grant which, rightly acquired and applied, they are always ready to make, as none of the rights or interests of their nation are hurt by it; while on the contrary they experience and receive great use, benefits and profits from the commerce which the Europeans therein establish with them."

Let me note there another piece of evidence to shew the course of proceeding followed by the French in order to acquire, and whereby I submit they did acquire, the sovereignty of this country—no one else being in possession of it. What they did was this: after conciliating the Indians they obtained from them grants of a local landed possession. There was no other way by which they could proceed to acquire sovereignty.

The LORD CHANCELLOR.—The context rather shews the contrary, because it says that the French possession interfered not with the rights of the Indians. And then he had said just before that the Indians were in the habit of making grants of this sort:

"A grant which, rightly acquired and applied, they" that is the Indians "are always ready to make, as none of the rights or interests of their nation are hurt by it."

Lord ABERDARE.—As long as they were lessees with the full power of hunting, they did not care where the right to the territory rested.

Mr. MOWAT.—That is quite so, and they were willing to grant any rights (beyond that power of hunting) which the European nations desired from time to time. It is the cumulative force of these things which makes the point clear, that this territory had become French territory, and was what was ceded to England in 1763. Now, my Lord, if you will allow me, on page 602, I will read a little more on this point.

Sir MONTAGUE SMITH.—What is the meaning of this:

"No Canadian is suffered to trade with the Indians but by license from the Government?"

Mr. MOWAT.—"But by license." That is the very point.

"No Canadian is suffered to trade with the Indians but by license from the Government, and under such regulations as that license ordains."

I think that is in my favour as shewing that all this was done under government action. I mean, it was not the volunteer action of those who went in there to trade, but they were all acting under the Government, and by the authority of the Government:

"The main police of which is this: The government divides the Indian countries into so many hunts, according as they are divided by the Indians themselves. To these several hunts there are licenses respectively adapted, with regulations respecting the spirit of the nation whose hunt it is; respecting the commerce and interest of that nation; respecting the nature of that hunt. The Canadian having such license ought not to trade and hunt within the limits of such hunt but according to the above regulations; and he is hereby absolutely excluded, under severe penalties, to trade or hunt beyond these limits on any account whatever.

"It were needless to point out the many good and beneficial effects arising from this police which gave thus a right attention to the interest of the Indians, which observe the true spirit of the alliance in putting the trade upon a fair foundation, and which maintained all the rights and laws of the hunt that the Indians most indispensably exact."

Will your Lordship allow me to make here this observation, in view of which these different extracts should be read—that this governmental interference by

the French constantly during all this period was never objected to by the Hudson's Bay Company as far as regards the territory in question; and it was not objected to by England either. Both England and the company recognized evidently the right of France to occupy this territory, and acquire the sovereignty of it in that way:

"But the consequence of the most important service which arises out of this police, is a regular, definite, precise, assured knowledge of the country. A man whose interest and commerce are circumscribed within a certain department, will pry into and scrutinize every hole and corner of that district. When such a hunt is, by these means, as full of these *coureurs des bois* as the commerce of it will bear, whoever applies for a license must betake himself to some new tract or hunt, by which again begins an opening to new discoveries and fresh acquisitions. When the French have, by these means, established a hunt, a commerce, alliance and influence amongst the Indians of that tract, and have, by these means, acquired a knowledge of all the waters, passes, portages and posts that may hold the command of that country—in short, a military knowledge of the ground—then, and not before, they ask and obtain leave of the Indians to strengthen their trading house, to make it a fort, to put a garrison in it."

A garrison, of course, implies troops of the King:

"In this manner, by becoming hunters and creating alliances with the Indians as brother sportsmen, by founding that alliance upon, and maintaining it (according to the true spirit of the Indian law of nations) in a right communication and exercise of the true interest of the hunt, they have insinuated themselves into an influence over the Indians, have been admitted into a landed possession, and by locating and fixing those possessions in alliance with, and by the friendly guidance of, the waters [of the St. Lawrence and Mississippi, and of the Winnipeg system] whose influence extends throughout the whole, they are become possessed of a real interest in, and real command over, the country."

The Lord Chancellor.—And you say that is annexation?

Mr. Mowat.—I say it is the way in which a desert country of this kind becomes possessed by one nation rather than another.

The Lord Chancellor.—It may be a great step towards it, no doubt.

Lord Aberdare.—That is a curious expression if it is annexation, and a very round about way of saying that they had annexed a country, or that they considered it a portion of French territory.

The Lord Chancellor.—You might say we had annexed Borneo according to that.

Mr. Mowat.—All America was acquired in this way; it belonged to the Indians.

The Lord Chancellor.—It is impossible to deny that such a mode of proceeding might very easily terminate in annexation; but that it is annexation in itself is a different thing.

Mr. Mowat.—These are just some of the steps that are needed for that purpose; that is the view at least we submit to your Lordships. A report of this kind is free from any doubt or suspicion as to its accuracy, because it is made by the English governor, and its purpose is to inform his superiors of what another nation is doing to acquire the sovereignty of the country.

Sir Montague Smith.—Line 30 seems to be a summary of it all:

"They have thus througout the country sixty or seventy forts."

Mr. Mowat.—Yes:

"They have thus throughout the country sixty or seventy forts, and almost as many settlements, which take the lead in the command of the country, not even one of which forts without the above true spirit of policy could they support with all the expense and force of Canada;"—it was from Canada that they were governed—"not all the power of France could; 'tis the Indian interest alone that does maintain these posts."

It is in consequence of always respecting these Indian customs that the English government has been so successful with the Indians, and contrasts so favourably in that respect with the United States, where they are always at war with the Indians and terrible disasters and atrocities are occurring between them:

"Having thus got possession in any certain tract, and having one principal fort, they get leave to build other trading houses and entrepôts, at length to strengthen such, and in fine to take possession of more advanced posts, and to fortify and garrison them, as little subordinate forts under the command of the principal one."

Lord ABERDARE.—Suppose the Hudson's Bay Company had pushed forward and came into collision with these forts, and there had been fighting, there probably would have been what would have been considered a case of war—do you say that the French would have considered it a violation of their territory?

Mr. SCOBLE.—It was one ground of the war that led to the Peace of Ryswick that the settlements of Hudson's Bay were attacked by the French.

Lord ABERDARE.—That is quite another part of the territory. We are now speaking of places hundreds and hundreds of miles from Hudson's Bay.

Sir ROBERT COLLIER.—They speak of Canada in the next line.

Mr. MOWAT.—Yes:

"Though these principal forts have subordinate forts dependent upon them, they are yet independent of each other, and only under the command of the Governor-General; there is a routine of duty settled for these, and the officers and commanders are removed to better and better commands. What the particulars of this are, and of the distribution of the troops, I have not yet learned as to Canada, but in general the present establishment for this service is three thousand men, of which there are generally two thousand three or four hundred effective." Then he says:—"I have not been able yet to get an exact list of the forts in Canada."

Sir ROBERT COLLIER.—Then he gives a list of what he supposes to be the forts of Canada.

The LORD CHANCELLOR.—As far as I can follow the names, they do not seem to go beyond the undisputed limits of Canada.

Mr. MOWAT.—A good many of them are in the country along the Mississippi; others are in the territory of which we have been speaking. For instance, about the middle of page 603 Fort Alibi is mentioned, that is north of the height of land, near James' Bay.

The LORD CHANCELLOR.—That I suppose is within the undisputed limits of Canada.

Mr. MOWAT.—It is north of the height of land—Fort Abbitibi.

Lord ABERDARE.—That is within the territory which was conceded expressly to the Hudson's Bay Company by the Treaty of Utrecht, and before the document of which you speak.

Mr. MOWAT.—It in fact continued always in possession of France after the Treaty of Utrecht.

Sir ROBERT COLLIER.—It appears to have been occupied by the French. They had a fort at Abbitibi.

Mr. MOWAT.—Yes; the map says of it: "Built by De Troyes in 1686." And of another post on Lake Abbitibi: "French Post founded before 1703."

The LORD CHANCELLOR.—In this list, at page 603, as far as the report of Governor Pownall is concerned, it might be important, because he says these particular forts are within what he understood to be Canada.

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—Now I want to know whether there are any others which are outside the undisputed limits of Canada.

Mr. MOWAT.—What am I to consider as the undisputed limits of Canada?

The LORD CHANCELLOR.—I mean Canada as it was after part of it had been ceded to the United States.

Mr. MOWAT.—All north of the lakes remained to Canada.

The LORD CHANCELLOR.—These ten are mentioned—can you point out on the map any others?

Mr. MOWAT.—There is Fort Abbitibi. Then, in his evidence before the Parliamentary Committee of 1749, Richard White says:

"The French intercept the Indians coming down with their trade, as the witness believes, he having seen them with guns and clothing of French manufacture, and that an Indian told him there was a French settlement up Moose River, something to the southward of the west at the distance as the witness apprehends, of about fifty miles."

The LORD CHANCELLOR.—Is the one you pointed out before between Lake Huron and Lake Michigan?

Mr. MOWAT.—Michillimackinac; there is no question about that.

The LORD CHANCELLOR.—That clearly was within the limits of Canada until it was ceded to the United States.

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—Then Du Quesne—where is that?

Mr. MOWAT.—At the junction of the Ohio and Alleghany Rivers. I may mention generally that the only names in the territory to the north or west of the height of land with which we have to do in this paper, are Alibi, certain of the posts dependent on Nepigon and Michillimackinac, and the posts of the Sioux and St. Antoine—the latter on the Upper Mississippi.

Sir ROBERT COLLIER.—Are there any of them to the west?

Lord ABERDARE.—None of these are to the west.

Mr. MOWAT.—With regard to the others, while the post is in one particular place yet the territory which is supposed to be annexed to it extends much further. For instance, "Missilimakinak and its dependencies" is the first mentioned there; and it is an historical fact, and there is evidence of it in this book, that the dependencies there extended north and west of the height of land, although the fort itself was south. And of the six forts grouped here as dependencies of Nepigon, some were situated beyond the height of land.

The LORD CHANCELLOR.—Is it by Lake St. Joseph?

Mr. MOWAT.—There is a fort at Lake St. Joseph.

The LORD CHANCELLOR.—That seems to be exactly within the limits of what was given to Canada.

Sir MONTAGUE SMITH.—North of the limits given by the award.

The LORD CHANCELLOR.—It is within those limits. It is by the south bank of the Lake St. Joseph.

Mr. MOWAT.—Yes, my Lord. I think it is within the limits that the award gave to us. It is on a river which flows into Lake St. Joseph there, and that river passes through the territories that the arbitrators gave us. Then there is also Fort Kamanistiquia, near Lake Superior.

The LORD CHANCELLOR.—This list derives importance from this heading, "Forts in Canada." Anything you can bring into that is certainly described at that time as being what was understood to be Canada, and I think although he says just before he has not been able to give an exact list of all the forts in Canada, yet one may infer that those are all that he had a list of.

Mr. MOWAT.—Yes, I think he does not mention any others. I shall have to go to other testimony for the others.

Sir ROBERT COLLIER.—Fort St. Joseph—do I understand that to be west of the line from the confluence of the Ohio and the Mississippi? I suppose it was;

therefore I suppose that to be in your favour, as excluding their boundary, which is the line from the Ohio to the Mississippi.

Sir MONTAGUE SMITH.—That would carry you to the west of their boundary.

Mr. MOWAT.—There is quite a number of forts between the Mississippi and the due north line.

Sir ROBERT COLLIER.—Take Fort St. Joseph: that may be taken as carrying the boundary west of the line they contend for.

Mr. MOWAT.—Yes, my Lord.

Sir ROBERT COLLIER.—Are there any others of that kind?

Mr. MOWAT.—Fort Kamanistiquia would be. It also is west of that due north line. You will see Fort William there, and then the Indian name under it. The present name is Fort William.

Sir ROBERT COLLIER.—Yes, that is not in this list.

The LORD CHANCELOR.—The value of this is that they are all forts in Canada.

Mr. MOWAT.—Yes, my Lord. There is another in this list which is on the Upper Mississippi and west of the due north line—Post Sioux.

Sir ROBERT COLLIER.—Where is that?

Mr. MOWAT.—They are not marked with that name, but that is the general name which they received. Fort St. Croix, built before 1688, your Lordship will see there [*pointing on the map*].

Sir ROBERT COLLIER.—Is that in this list?

Mr. MOWAT.—It is included in the word Sioux. The word embraces a number, of which that is one.

The LORD CHANCELLOR.—No doubt that was, I suppose, in Canada until the cession to the United States.?

Mr. MOWAT.—Yes, my Lord.

Sir ROBERT COLLIER.—To the west of Lake Superior, no doubt.

Sir MONTAGUE SMITH.—There is a fort just to the north of Pigeon River—there is a number of those forts which you say came within the general description of the Sioux.

Mr. MOWAT.—Yes, my Lord, and Canada at that time was considered to extend over the Mississippi to the west bank of it, and some of the forts included under this name were on the west side of the Mississippi, and they were all considered as part of Canada—but of course that portion west of the Mississippi was not ceded to the English.

The LORD CHANCELLOR.—Where is Miamis?

Mr. MOWAT.—There were two of the name: one to the south-west of Lake Erie—a little below the most southerly part of it; the other on the south-easterly shore of Lake Michigan.

The LORD CHANCELLOR.—Then it seems clear that the whole of those forts are within the district which it is not in controversy was Canadian, or only in controversy in the view of those who draw the line up from the Ohio.

Mr. MOWAT.—Your Lordship will find several named on the Upper Mississippi. For instance, St. Antoine is mentioned; it is spoken of as being a fine one. That is in the region of which we have been speaking. I shall give your Lordships more particular information about these posts in the further evidence.

The LORD CHANCELLOR.—It seems to be established that there were these forts reputed to be in Canada which we have at page 603, and that in the territories which were treated as Indian territories, for some purposes at all events, the French had other forts acquired in the manner which is described in the documents.

Mr. MOWAT.—Then, I may assume for the present—

Sir MONTAGUE SMITH.—You had better go on with any further evidence.

Mr. MOWAT.—There was a committee of the House of Commons in 1749* before which evidence was taken, and it is satisfactory because the Hudson's Bay Company was represented, and therefore whatever took place may be relied upon. It is at page 581. Joseph Robson is one of the witnesses. He

"Thinks that the beavers which are brought down to the company are refused by the French, from their being a heavy commodity; for the natives who come to trade with the company dispose of their small valuable furs to the French, and bring down their heavy goods to the company in summer when the rivers are open, which they sell, and supply the French with European goods purchased from the company."

Richard White says:

"The French intercept the Indians coming down with their trade as the witness believes, he having seen them with guns and clothing of French manufacture; and that an Indian told him there was a French settlement up Moose River, something to the southward of the west, at the distance, as the witness apprehends, of about fifty miles. The French deal in light furs, and take all they can get, and the Indians bring the heavy to us. He never knew any Indians who had met the French bring down any light furs. The French settlement on Moose River is on Abbitibis Lake. The trade might be further extended by sending up Europeans to winter among the natives, which, though the Company have not lately attempted, the French actually do."

The LORD CHANCELLOR.—Is that the Alibi settlement that you were referring to just now?

Lord ABERDARE.—Yes, I think so.

Mr. MOWAT.—That is referred to; but I think there was another one there, on the Moose River. The Moose is another river which flows into Hudson's Bay, or rather into James' Bay, at the foot of Hudson's Bay. It was upon that river that this fort was built.

Lord ABERDARE.—I think there can be no question that the French did claim the territory at the south of James' Bay, because it was the subject of continuous discussion in various treaties.

Mr. MOWAT.—Quite so, my Lord. Then, the witnesses go on to describe the course of proceeding, and shew that the French really possessed the interior of the country at that time completely.

The LORD CHANCELLOR.—Where do they shew that? I see a good deal of evidence as to trading, but where is there anything about complete possession of the interior?

Mr. MOWAT.—It was in that way that they had possession.

The LORD CHANCELLOR.—That is your argument?

Mr. MOWAT.—That is my argument; but that is the only way in which it was ever done.

The LORD CHANCELLOR.—These witnesses are certainly speaking of trade, evidently.

Mr. MOWAT.—They are telling how the thing occurred, and how it was managed, and shewing that the whole of the interior trade was in the hands of the French. Robert Griffin says:

"The French intercept the trade, to prevent which the Company some time ago built Henley House, which did in some measure answer the purpose."

That is the only fort that they did build, before the cession, away from the Bay.

Lord ABERDARE.—That is to say, up on the river?

Mr. MOWAT.—Yes. The witness continues:

"But if they would build further in the country, it would have a better effect. The

* Report from the Committee appointed to enquire into the state and condition of the countries adjoining to Hudson's Bay, and of the trade carried on there, together with an Appendix. Reported by Lord Strange, April 24, 1749. (Pages 216, 218, 226-7, 234.)

French went there first and are better beloved, but, if we would go up into the country, the French Indians would trade with us."

Alexander Brown says:

"The French intercepting the Southern Indians, and by that means obtaining the valuable furs. Has been informed by the Indians that the French Canadese Indians come within sixscore miles of the English factories. The French Indians come to Albany to trade for their heavy goods. Has heard Mr. Norton (the governor) say that the French ran away with our trade. If the trade was opened, the French would not intercept the Indians, since in that case the separate traders must have out-factories in the same manner the French have, which the company have not;" and being asked, "In case these out-settlements were erected, whether the same trade could be carried on at the present settlements," he said: "That it was impossible, but the trade would be extended, and by that means they would take it from the French. That, if these settlements were near the French, they must have garrisons to secure them against the French, and the Indians who trade with and are in friendship with them (whom he distinguished by the name of French Indians). He heard the Indians tell Governor Norton, in the year 1739, that the French had a settlement at about the distance of a hundred or sixscore miles from Churchill, which had then been built about a year, and contained sixty men with small arms."

I think eighty was the number that was usual at the forts, according to the evidence.

The LORD CHANCELLOR.—Where is Churchill?

Mr. MOWAT.—It is at the mouth of the Churchill River, on the north-westerly shore of the bay. Then there is a general account of the proceedings. I now beg to refer your Lordships to some historical evidence of that distant period, which you will find at page 64 of the Appendix of Ontario.

The LORD CHANCELLOR.—That is a separate book of documents, is it not?

Mr. MOWAT.—Yes; a separate book of documents—the smaller book. I will read a little from the beginning of this paper It is from Sir Alexander Mackenzie,* and shews the course of proceeding, and confirms what I have said as to the French having occupied the territory in a way which, according to the rules of international law, gave them the sovereignty, until the treaty ceded the territory to England:

"The Indians, therefore, to procure the necessary supply, were encouraged to penetrate into the country, and were generally accompanied by some of the Canadians"—this is telling the proceedings of the French—not of the Hudson's Bay Company—in the North-West territory, "who found means to induce the remotest tribes to bring the skins which were most in demand to their settlements in the way of trade. At length, military posts were established,"—that means by the French—"at the confluence of the different large lakes of Canada, which in a great measure checked the evil consequences that followed from the improper conduct of these foresters [*coureurs des bois*], and at the same time protected the trade. Besides, a number of able and respectable men, retired from the army, prosecuted the trade in person, under their respective licenses, with great order and regularity, and extended it to such a distance as in those days was considered to be an astonishing effort of commercial enterprise."

Then, speaking of missionaries:

"They were during their mission of great service to the commanders who engaged in those distant expeditions, and spread the fur trade as far west as the banks of the Saskatchiwine River, in 53° north latitude, and longitude 102° west."

Lord ABERDARE.—From that, would it not seem that all those expeditions were undertaken by the *coureurs des bois*, from the basis of forts erected on the

* "A General History of the Fur Trade, from Canada to the North-West," printed with, and forming an introduction to the work: "Voyages from Montreal, on the River St. Lawrence, through the Continent of North America, to the Frozen and Pacific Oceans, in the years 1789 and 1793. . . . London: 1801."

great lakes? All this shews that they are hunting, and so on, from the basis of these forts, and that the forts were there to keep them in order with the natives:

"At length, military posts were established [by the French] at the confluence of the different large lakes, which in a great measure checked the evil consequences that followed from the improper conduct of these foresters [*coureurs des bois*], and at the same time protected the trade."

Then it was a sort of basis from which these men traded.

Mr. MOWAT.—But they did this under the authority of the Government.

Lord ABERDARE.—That is only the forts that were erected; they were hunting into this open country. I do not think it shews any more than that.

Mr. MOWAT.—I shall shew where these posts are. There is quite a large number of forts south of the great lakes, then there is a number also north of the great lakes, and in this North-West territory, which I allude to for the purpose—

Sir MONTAGUE SMITH.—Those on the great lakes are most important for us here.

Mr. MOWAT.—But it is not merely those, as will appear as you read along. The very next paragraph shews it:

"They [the missionaries] were, during their mission, of great service to the commanders who engaged in those distant expeditions and spread the fur trade as far west as the banks of Saskatchewine River; in 53° north latitude, and longitude, 102° west."

He gives the latitude there, which shews how far they went up:

"Notwithstanding all the restrictions with which commerce was oppressed under the French government, the fur trade was extended to the immense distance which has been already stated, and surmounted many most discouraging difficulties which will be hereafter noticed; while at the same time no exertions were made from Hudson's Bay to obtain even a share of the trade of the country which, according to the charter of that Company, belonged to it, and from its proximity, is so much more accessible to the mercantile adventurer."

The LORD CHANCELLOR.—This is what the whole book seems to be, the history of the fur trade.

Mr. MOWAT.—Yes, and the fur trade was the only trade prosecuted in the territory at that time.

The LORD CHANCELLOR.—There is nothing specially about the possessions of the company.

Lord ABERDARE.—That assumes, "according to the charter of that company," that this region, invaded by the French chasseurs, or *coureurs des bois*, was in fact belonging to the Hudson's Bay Company.

Mr. MOWAT.—Your Lordship sees the words "which according to the charter of that Company belonged to it." That certainly does assume that, in a sense, but—

Lord ABERDARE.—Of course if you quote it as an authority, you must take it altogether.

The LORD CHANCELLOR.—It would seem beyond all reasonable doubt that the French carried on trade and erected for the purpose of trade certain forts. There seems no question about that, and apparently that at the same time the Hudson's Bay Company were not competing in the same territory. If that is enough to establish territorial sovereignty, you have done it.

Sir ROBERT COLLIER.—They seem to have established forts, as shewn here, as far west as the Saskatchewan River, which is a long way to the west. You will see at line 30:

"One of these, Thomas Curry, with a spirit of enterprise superior to that of his contemporaries, determined to penetrate to the furthest limits of the French discoveries

in that country, or at least till the frost should stop him. For this purpose he procured guides and interpreters who were acquainted with the country, and with four canoes arrived at Fort Bourbon, which was one of their posts, at the west end of Cedar Lake, on the waters of the Saskatchiwine."

That is a good way to the west I suppose ?

Mr. MOWAT.—Yes, a great distance to the west.

Sir ROBERT COLLIER.—I see several forts are marked.

Mr. MOWAT.—Yes, all the important ones are marked. The Fort Bourbon here mentioned is marked near the point of discharge of the Saskatchewan into Lake Winnipeg. There is quite a number of forts: I have not mentioned them all yet.

Lord ABERDARE.—Is your contention that all these existing places round Manitoba formed a portion of the district of Upper Canada.

Mr. MOWAT.—Yes, my Lord. I am not claiming them now, but they formed a portion of it. They belonged to Upper Canada, because they were ceded by France to England.

The LORD CHANCELLOR.—It is quite clear that that is what Sir Alexander Mackenzie speaks of, because he says in the passage just referred to:

"For this purpose he procured guides and interpreters who were acquainted with the country, and with four canoes arrived at Fort Bourbon, which was one of their posts, at the west end of Cedar Lake on the waters of the Saskatchiwine. His risk and toil were well recompensed, for he came back the following spring with his canoes filled with fine furs, with which he proceeded to Canada, and was satisfied never again to return to the Indian country."

Mr. MOWAT.—Of course he referred there to the better settled and better known parts of Canada. If your Lordships would permit me, I should now like to call your Lordships' attention to a few more passages bearing on this question, as it is very important. Sir Alexander Mackenzie goes on, at page 65, in this way:

"For some time after the conquest of Canada this trade was suspended.....The trade by degrees began to spread over the different parts to which it had been carried by the French, though at a great risk of the lives, as well as the property of their new possessors, for the nativeshad been taught by their former allies to entertain hostile feelings towards the English, from their having been in alliance with their natural enemies the Iroquois... ..Hence it arose that it was so late as the year 1766 before which the trade I mean to consider commenced at Michilimakinac. The first who attempted it were satisfied to go the length of the River Camenistiquia."

Sir ROBERT COLLIER.—We have read the whole of that passage already.

Mr. MOWAT.—I beg your Lordship's pardon.—Then there is a report by Colonel de Bougainville on the French Posts of Canada, 1757, which is at page 25 of the Ontario Appendix.* He deals with some posts that are not material

* From his "Memoir on the State of New France at the time of the Seven Years' War" (1757). Louis Antoine de Bougainville was one of the most distinguished French officers in the war which resulted in the conquest of Canada. The French original of his *Mémoire* is given in "*Relations et Mémoires Inédits, etc., par Pierre Margry*, Paris, 1867. His account of the Post of *La Mer de l'Ouest* is appended at length:—

POST OF THE WESTERN SEA *(La Mer de l'Ouest)*.—The Post of the Western Sea is the most advanced towards the north; it is situated amidst many Indian tribes, with whom we trade, and who have intercourse also with the English, towards Hudson's Bay. We have there seven forts built of stockades, trusted, generally, to the care of one or two officers, seven or eight soldiers, and eighty *engagés Canadiens*. We can push further the discoveries we have made in that country, and communicate even with California. The post of *La Mer d'Ouest* includes the forts St. Pierre, St. Charles, Bourbon, de la Reine, Dauphin, Poskoia, [and] des Prairies, all of which are built with palisades that can give protection only against the Indians. Fort St. Pierre is situated on the left shore of Lake Tekamamiouen, or Lac de la Pluie [Rainy Lake], at 500 leagues from Michilimakinak, and 300 from Kamanistigoya or *les Trois Rivières*, to the north-west of Lake Superior. Fort St. Charles is situated sixty leagues from Fort St. Pierre, on a peninsula that goes far into Lac des Bois [Lake of the Woods]. Fort Bourbon is at one hundred and fifty leagues from the preceding one, and at the entrance of Lake Ouinipeg. Fort la Reine is situated on the right shore of the River of the Assiniboëls, at seventy leagues from Fort Bourbon: this country is composed of vast prairies; it is the route to go through to the upper part of the Missouri. Fort Dauphin is at eighty leagues

for our present purpose, I think, but I propose to call your Lordships' attention to what is said on page 27, commencing with line 30, where he does refer to posts that are material for our present purpose :

" *Post of the Western Sea* (La Mer de l'Ouest).—The Post of the Western Sea is the most advanced towards the north. It is situated amidst many Indian tribes with whom we trade, and who have intercourse also with the English towards Hudson's Bay. We have there seven forts, built of stockades, trusted, generally, to the care of one or two officers, seven or eight soldiers, and 80 *engagés Canadiens*. We can push further the discoveries we have made in that country, and communicate even with California."

So he there states how many forts they then had in that quarter.

Sir ROBERT COLLIER.—How do you say this report is given—for whom?

Mr. MOWAT.—I refer to it as a piece of historical evidence; it is the only way we can get at the facts relating to this distant period.

Sir ROBERT COLLIER.—But it is a statement by Colonel de Bougainville, to whom ? It is made on what occasion ?

Mr. MOWAT.—It is taken from a "Memoir on the State of New France at the time of the Seven Years' War," (1757). The memoir is in the printed book here mentioned, and from it I took this extract.

Sir ROBERT COLLIER.—Was it addressed to his own government, or what ?

Mr. MOWAT.—The book was printed for general circulation.

The LORD CHANCELLOR.—However, the passage you have read speaks of a particular post, which I suppose is to the south of the territory we are talking about, because he speaks of communication with California.

Mr. MOWAT.—"The Post of the Western Sea" means all the North-West territory. What follows shews that.

Lord ABERDARE.—Why was this country called "La Mer de l'Ouest ?"

Mr. MOWAT.—It was the name given by the French geographers, of the period 1695-1763, to a supposed inland sea near the western coast of America, represented as connected with the ocean at first by one and subsequently by two passages or straits, its position corresponding, on the later maps, to that of the Gulf of Georgia, (Straits of Vancouver), and the two passages corresponding to the two entrances to the latter, respectively north and south of Vancouver's Island. And it was supposed that from this Post the discovery of this Western Sea might be accomplished overland and the South Sea (Pacific Ocean) be reached.

The LORD CHANCELLOR.—Is this particular post marked anywhere ?

Mr. MOWAT.—The post includes a number of forts. A post did not mean one single building; it means a series of forts.

The LORD CHANCELLOR.—It was a post consisting of several forts ?

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from the preceding one, on the river Minanghenachequeké, or Eau Trouble. Fort Poskoia is built on the river of that name [now Saskatchewan], at 180 leagues from the preceding one; it takes ten days from this fort to reach Nelson River. The Fort des Prairies is at eighty leagues from Fort Poskoia, on the upper part of the river of that name. This post has been farmed in consideration of a sum of eight thousand francs; the commandant is its farmer, with a fourth interest in its trade. The Indians who trade there are the Cristinaux and the Assiniboëls; these two tribes form each twelve villages inhabited respectively by two hundred and fifty men (*hommes*). This post produces usually from three to four hundred bundles of furs; we must take into account also fifty to sixty slaves, Rouges or Panis, of Jatihilinine, a nation situated on the Missouri, and which plays the same *rôle* in America that the negroes do in Europe. This is the only post where this traffic takes place.

The post of *La Mer d'Ouest* merits special attention for two reasons—the first, that it is the nearest to the establishments of the English at Hudson's Bay, and from which their movements can be watched; the second that from this post the discovery of the Western Sea may be accomplished; but to make this discovery it will be necessary that the *voyageurs* give up all views of personal interest.

The one who advanced this discovery most was the Sieur de la Veranderie; he went from Fort de la Reine to reach the Missouri. Upon this river he first met the Mandanes or Blancs-Barbus, numbering seven villages, surrounded by forts of staked earthworks, with a moat; then the Kinongewiniris or Brochets, composing three villages; at the upper part of the river he found the Mahantas, also composing three

Mr. MOWAT.—Yes, my Lord, you will see that by the paragraph beginning:

"The post of La Mer d' Ouest includes the Forts of St. Pierre, St. Charles, Bourbon, De la Reine, Dauphin, Poskoia, and Des Prairies."

The LORD CHANCELLOR.—I wanted, if possible, to see them on the map.

Mr. MOWAT.—They are all on this map [*the Ontario Government map*].

Lord ABERDARE.—This country is called "La Mer d' Ouest."

Mr. MOWAT.—All these forts are considered to be included in it, and they are marked. The Post of the Western Sea embraces the whole of the territory. The whole of the North-West went under that name.

Lord ABERDARE.—On this map the letters "Western Sea" go through Manitoba. It was so called because it was supposed to be on the shores of the Pacific; where also California was to be found.

Mr. MOWAT.—I may mention here that one of my friends who is with me from Canada [Mr. Mills] has given attention for thirteen or fourteen years to this subject, and is an expert in all geographical matters connected with it. If your Lordships would allow him to address the court, besides myself and my learned friend Mr. Scoble, on that part of the matter simply, it might help to shorten the discussion.

The LORD CHANCELLOR.—Oh, no. As we said yesterday, we cannot hear three counsel.

Mr. MOWAT.—Then, my Lord, this goes on to describe all these forts, and points out where they are situated. Your Lordship has looked at them on the map, and I suppose I need not read them over; but at each of them there are officers, at each of them there are soldiers, at each of them there are men employed in very large numbers—eighty. In this respect much more was done to acquire sovereignty for France than the Hudson's Bay Company did to acquire sovereignty for England over whatever territories they had occupied. Their forts were comparatively fewer, and they were not manned anything like so extensively. The evidence* shews that they had only 120 men and officers in all their forts, instead of the very large number that the French had.

Your Lordships asked who Colonel de Bougainville was, and I mentioned some things about him. I should have mentioned also that this memoir was submitted at the time it was written to General de Montcalm, whose aide-de-camp he was, and that that officer testified to the correctness of the information which it contained.

At page 28, speaking of this post, Colonel de Bougainville says:

"The post of La Mer d'Ouest merits special attention for two reasons—the first, that it is the nearest to the establishments of the English at Hudson's Bay, and from which

villages, and along the Missouri in descending it to the discharge of the River Wabiek, or to the Coquille, twenty-three villages of Panis.

To the south-west of this river, and on the two shores of Ouonaradeba, or à la Graisse, are the Hactannes or Gens du Serpent. They extend from the foot of a chain of very high mountains [the Rocky Mountains], which run north, east, and south, and to the south of which is the River Karoskiou or Cerise-Pelée, which is supposed to reach California.

He continued his journey, and found in those vast territories, where the Missouri has its sources, opposite to, and about forty leagues from the Mahantas, the Owilinioek or Beaux-Hommes, four villages; opposite the Brochets, the Macateoualasites or Pieds-Noirs [Blackfeet], three villages of about 100 cabins each; opposite the Mandanes are the Ospekakaerenousques or Gens du Plat Côté, four villages; opposite the Panis are the Gens de l'Arc, named the Atchapcivinioques by the Christinaux, and Utasibaoutchactas by the Assiniboëls, three villages; after these are found the Makesch or Petits Renards, two villages; the Privassa or Grands-Parleurs, three villages; the Kakakoschena or Gens de la Pie, five villages; the Kiskipisounouinini or Gens de la Jarretière, seven villages.

He could not go further on account of the war which was then being waged between the Gens de la Jarretière and the neighbouring nation. I may here observe, that it is perhaps improper to use the term villages as I have done, for all these nations which inhabit the prairies form, like the Tartars, wandering hordes, live by the chase, and dwell in huts covered with skins.

* Middleton to Dobbs, Joint App., p. 581, line 13, quoted *ante*, p. 59: "Out of 120 men and officers the company have in the Bay," etc.

their movements can be watched ; the second, that from this post the discovery of the Western Sea may be accomplished ; but to make this discovery it will be necessary that the *voyageurs* give up all views of personal interest."

Then he goes on to say, amongst other things, what steps were taken for the purpose of discovery. The French always had that matter in view, and were constantly making discoveries and extending their possessions. Then at page 29, we have the Post of Tabitibi.

"Tabitibi is a post dependent upon Temiscamingue, situated at 120 leagues from the preceding fort, towards Hudson's Bay. Each post may contain one hundred men. They subsist on game and fishing. They sow no grain and have no village. All this country is mountainous, and not at all fertile. The post produces about 120 bundles of furs."

The Lord Chancellor.—Where does that lie ?

Mr. Mowat.—It is a little south of James' Bay. Then he describes, a little lower down, the method of proceeding. At line thirty he says :

"We call *congé* the licenses or permits that are granted by the Governor-General for a canoe laden with six thousand pounds of merchandizes intended to be sold in one of the posts indicated. Such a license costs fifty pistoles. The Governor-General, who is at liberty to give more or less, applies these funds for the maintenance of poor families of officers. Account is given to the King of only twenty-two licenses. The Governor sometimes gives as many as forty. The half of the fifty pistoles goes to the King, and the other half is at the disposal of the Governor for gratuities."

I have collected the evidence here in regard to every one of these forts and posts. Some of it I have read ; and some of it I have not yet read, as I do not know whether my learned friends on the other side are going to dispute any of these things.

The Lord Chancellor.—I should doubt whether they would dispute the historic account of these things given at the time, in 1757, by a well known French writer, and as you say (and I daresay correctly) approved by the Government of Quebec. I should think the effect of that probably would not be agreed upon between you, but the facts I should think would be agreed.

Lord Aberdare.—I suppose the fact that all these various fortresses that are scattered over these various places were put there by Frenchmen would not be disputed. The question is, as the Lord Chancellor has said, the effect of that.

Mr. Mowat.—Well, for the present, I shall not trouble your Lordships with putting together the vast amount of evidence there is bearing upon all these forts.

Then, as your Lordships have asked me what evidence there is as to how far this territory was claimed by Upper Canada, as belonging to it, I will refer your Lordships to what appears upon that subject. It is necessarily, to a considerable extent, in historical documents. The first I would mention is at page 412, where there is a petition set forth. It commences at page 410. It is a petition by the Earl of Selkirk in reference to an Act of Upper Canada, 59 Geo. 3, cap. 10, (1818), which is entitled, "An Act to authorize the enquiry and trial of Crimes and Offences, committed within this Province, without the limits of any described Township or County, to be had in any District thereof." The Act itself is at page 409.* The petition is at page 410. The petition is a long

* Sec. 1 of the Act in question is as follows :—

"Whereas by an Act passed in the thirty-eighth year of His Majesty's reign, entitled, "An Act for the better division of this Province," large tracts of country are comprehended in the several Districts of this Province, which are not within the limits of any Township or County therein ; and whereas crimes and offences have been committed, and may hereafter be committed, in such tracts of country, which it might be inconvenient to try in the particular Districts wherein the same may have been committed ; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled, "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign,

one, and the passages that I am going to read to your Lordships are the only ones probably that are material for our present purposes.* The Earl of Selkirk complained of this Act, and he wished to have it disallowed.

The LORD CHANCELLOR.—I do not see that he complains of the Act. At page 410 there is a complaint against some legal proceedings in the Canadian courts.

Mr. MOWAT.—Yes, but proceedings in connection with this Act; and I have a statement here which shews that Upper Canada was claiming jurisdiction. It is one piece of evidence to shew that Upper Canada actively claimed jurisdiction beyond the due north line.

Lord ABERDARE.—"Westward to an indefinite distance," he says.

Mr. MOWAT.—Yes, my Lord. At page 412 there are two or three sentences which will shew what I mean. He complains:

"That the Chief Justice of Upper Canada in defiance of the Act of Parliament, which declares the western boundary of Canada to be a line drawn northward from the point of junction of the Rivers Ohio and Mississippi,"—

Of course that was his point, that that was our limit, and he says that there was an Act of Parliament saying so, and that the Chief Justice acted in defiance of that:

—"and in opposition to the unanimous decision of the court at Quebec, asserts that the Western District of Upper Canada extends westward to an indefinite distance."

That is the expression that your Lordship read just now. So that there the Earl of Selkirk pointed out what it was which in his view the Chief Justice of Upper Canada asserted on that subject:

"That in consequence of this extraordinary doctrine, your memorialist is apprehensive that under the provisions of this new Provincial Act the Chief Justice will not hesitate to issue bench warrants for the purpose of arresting several persons now resident at the Red River settlement,"

and so on. I cite that as an historical statement of what is said in regard to that distant period.

The LORD CHANCELLOR.—You cite it as an historical statement, but is it in your favour?

Mr. MOWAT.—I cannot press it beyond what it says.

The LORD CHANCELLOR.—Because it says:

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entitled, 'An Act for making more effectual provision for the government of the Province of Quebec, in North America, and to make further provision for the government of the said Province,'" and by the authority of the same, That all crimes and offences committed in any of the said tracts of country or parts of this province, not being within the limits of any described county or township, may be inquired of and tried within any District of this province, and may and shall be laid and charged to have been committed within the jurisdiction of the court which shall try the same, and such court may and shall proceed thereon to trial, judgment, and execution, or other punishment for such crime or offence, in the same manner as if such crime or offence had been really committed within the District where such trial may be had, any law, usage, or custom, to the contrary notwithstanding."

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* PETITION OF THE EARL OF SELKIRK, 30th JULY, 1819.

To the Right Honourable the Lords of the Committee of Privy Council for the affairs of Trade and Foreign Plantations.

The Memorial of Thomas, Earl of Selkirk—

SHEWETH:

That in the month of September, one thousand eight hundred and eighteen, a Bill of Indictment was preferred against your memorialist at Sandwich, in the Western District of Upper Canada, for a conspiracy to destroy the trade of certain fur traders calling themselves the North-West Company of Montreal. * *

That as they could not succeed in their endeavours to obtain from the Grand Jury in the Western District a true bill against your memorialist for the alleged conspiracy, another bill was, immediately after the passing of this new Act, preferred against him on the same charge. * * The Bill has been found against your memorialist and nineteen other persons, most of whose names have been inserted in the Indictment, evidently for no other purpose than to prevent them being called as witnesses in your memorialist's defence.

"That the Chief Justice of Upper Canada in defiance of the Act of Parliament, which declares the western boundary of Canada to be a line drawn northward from the point of junction of the Rivers Ohio and Mississippi, and in opposition to the unanimous decision of the court at Quebec, asserts that the Western District of Upper Canada extends westward to an indefinite distance."

Mr. MOWAT.—Yes, but your Lordship will not take his construction of the Act of Parliament.

The LORD CHANCELLOR.—If you use it as a statement for any purpose, you must use it for all. How can it be a statement with regard to the rights?

Mr. MOWAT.—No, not with regard to the rights. I do not cite it for that purpose.

Sir BARNES PEACOCK.—You cite it as an historical statement only of the assertion of the Chief Justice.

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—Were these acts committed in Upper Canada?

Mr. MOWAT.—On the part of the Crown it was so claimed, and that the jurisdiction was therefore in the courts of that province; but on the part of Lord Selkirk, they were claimed to have been committed in the "Indian territories," and to be therefore, under the Imperial Act, 43 Geo. 3, c. 138, within the cognizance only of the courts of Lower Canada, unless relegated for special cause, by instrument under the great seal of Lower Canada, to the courts of Upper Canada; it was a Lower Canada court that tried the De Reinhard case.

Lord ABERDARE.—As against the "decision of the whole court," and "in defiance of the Act of Parliament," he made this assertion?

Mr. MOWAT.—In defiance of the Act of Parliament—that was Lord Selkirk's assertion. There was a trial in Lower Canada, in 1818, of persons charged with murder away up in the disputed territory, and in that case the court held that our westerly limit was a due north line from the Ohio and Mississippi. This had never been held before, and never acted upon before, and it appears from these papers in print before your Lordship that the question was referred to England, as to whether that construction of the Act of Parliament was the correct one, and after a good deal of correspondence, no opinion of the Law Officers appears to have been obtained—at all events after very diligent inquiry and search we have not been able to find that there was—and ultimately the man was pardoned. That is a single

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That your memorialist further submits that Fort William, a trading post occupied by the said North West Company, and the place where the alleged offences charged against him are stated to have been committed, is not situated within the jurisdiction of the courts of Upper Canada, as settled by the Act of Parliament of 14 George 3rd, c. 83, which defines the boundary of that Province, and therefore that these charges cannot be legally brought to trial in any court of Upper Canada.

That the Chief Justice of Upper Canada, in defiance of the Act of Parliament, which declares the western boundary of Canada to be a line drawn northward from the point of junction of the Rivers Ohio and Mississippi, and in opposition to the unanimous decision of the Court at Quebec, asserts that the Western District of Upper Canada extends westward to an indefinite distance. That, in consequence of this extraordinary doctrine, your memorialist is apprehensive that under the provisions of this new Provincial Act, the Chief Justice will not hesitate to issue Bench Warrants for the purpose of arresting several persons now resident at the Red River settlement, and that if such warrants are submitted to, or enforced, he will bring away the parties to a distance of two thousand miles, without their having any opportunity of bringing witnesses along with them, or the means for obtaining an impartial jury, or a fair trial. Your memorialist ought also to observe that as the settlers at Red River have obtained the opinion of several of the most eminent counsel in England, declaring that the Red River cannot be considered as in Canada, it is not unlikely that warrants issued (under the new Act) for the apprehension of any of the settlers at that place will be forcibly and, as your memorialist conceives, lawfully resisted.

That your memorialist further submits that as the Provincial enactment above mentioned is of an unusual and extraordinary nature, your memorialist conceives that the Lieutenant-Governor ought not to have expressed the Royal Assent to the Bill, without seeing that it contained a clause to suspend its operation till the pleasure of His Royal Highness the Prince Regent should be known. * * *

Your memorialist therefore prays that your Lordship will take the said Provincial Act into consideration as early as possible, and will advise His Royal Highness the Prince Regent in Council to disallow the same, and your memorialist further prays that when the said Act is to be taken under your Lordships' consideration he may be heard by counsel on the subject.

SELKIRK.

case—the only case—in which a decision of that kind was made. There is a great mass of evidence which we have now, and was not before the court then, to shew what the true construction of the statute is; for instance, a vast number of commissions, and the judges had not the advantage of those commissions; and the great argument—the conclusive argument—that the Act of 1774 recites, that its object was to give a government to those colonies and settlements, namely, the government of the British Crown, was not brought before the court at all; nor was a great variety of other matter. If reliance was placed on that decision, I could shew how very little material for judgment upon this point the court had; the judgment was never acted upon; it was not acted upon in that case, and it has not been acted upon by any court since.

The LORD PRESIDENT.—Was it not acted upon in McLellan's case?

Mr. MOWAT.—No, he was acquitted; and on the occasion I am mentioning the Quebec court charged the jury, and the jury came to a conclusion on whatever evidence was brought before them. No doubt there is that judgment, but your Lordships will not take the judgment as being correct unless it was right, and I argue that it was wrong.

The LORD CHANCELLOR.—I do not think you can make very much out of a statement of that kind.*

Mr. MOWAT.—I put it in as one piece of evidence. I am asked by your Lordships what is the position taken in Upper Canada with regard to this territory, and that is one of the pieces of evidence that I put forward, and it is only one of many.

Sir BARNES PEACOCK.—The prayer of the memorial is, that their Lordships:

"Will take the Provincial Act into consideration as early as possible, and will advise the Prince Regent in council to disallow the same."

The LORD CHANCELLOR.—What was done—was it disallowed?

Mr. MOWAT.—No, it was allowed.

Sir BARNES PEACOCK.—What was the Act?

Mr. MOWAT.—It is at page 409.†

The LORD CHANCELLOR.—However, that seems to add very little light, because that seems to provide for a jurisdiction in parts of the province "which are not within the limits of any township or county therein," but what the bounds of the province are it does not say.

Mr. MOWAT.—No, my Lord.

Sir MONTAGUE SMITH.—What does it say—that under these Acts they might go into these Districts?

Mr. MOWAT.—That they claimed the right to go, and would go.

Sir BARNES PEACOCK.—Had they ever done so, before the Hudson's Bay Company settled there?

Mr. MOWAT.—Yes. I will tell your Lordship what evidence of this there is. The Hudson's Bay Company also send in a petition, dated 3rd August, 1819, for the disallowance of the Act. At page 413, the company, your Lordship observes, informed the Lords of the Committee of the Privy Council for Trade and Foreign Plantations, that

"By the interpretation which has been put upon it by the Chief Justice and the Law Officers in that Province, it has had the effect of operating as an *ex post facto* law with respect to several of your memorialists' officers and servants, contrary to the established principles of justice, and to the law of England. For, in consequence of such interpretation, criminal prosecutions were immediately commenced, and a bill of indictment preferred, against certain of their officers and servants, for a conspiracy to destroy the trade

* Namely, the petition of Lord Selkirk.

† Sec. 1, printed *ante*, p. 97, note.

of the North-West Company, in having committed certain acts alleged to have taken place at Fort William (a trading post of that company) two years prior to the passing of the said colonial law. Your memorialists further submit that Fort William, where the said acts were alleged to have been committed, is not in Upper Canada,"

—that is carrying out the idea that it was a due north boundary—

"being situated to the west of the boundary line of that province (as established by Act of Parliament, 14 Geo. 3., c. 83), and therefore not within the jurisdiction or subject to the legislature of that province."

That was their construction.

Sir BARNES PEACOCK.—Fort William is within this part [*pointing on the map*]?

Mr. MOWAT.—Yes. It is a little west of the due north line, near the shore.

Sir BARNES PEACOCK.—This is what is included in Ontario by the award [*pointing*]?

Mr. MOWAT.—Yes, my Lord.

Sir ROBERT COLLIER.—The object of this Act was to enable the Governor, by proclamation, to declare that any part of the territories was within the Province of Upper Canada for the purpose of criminal jurisdiction.

The LORD CHANCELLOR.—No, it assumed that there were certain tracts, not parts of any described county or township, but which were within the limits of the province. It did not define any tracts. Assuming that it was within the province, the Act extended there.

Sir ROBERT COLLIER.—"Any of the said tracts of country," it says, "or parts of this province." I should read "tracts of country" as meaning tracts of country not being parts of the province, not being within the limits of any prescribed township or county for the purpose of trying prisoners. It is merely for the purpose of trying prisoners.

The LORD CHANCELLOR.—No, it is not so. The preamble commences:

"Whereas by an Act passed in the thirty-eighth year of His Majesty's reign, entitled 'An Act for the better division of this Province,' large tracts of country are comprehended in the several Districts of this Province which are not within the limits of any township or county therein."

Sir ROBERT COLLIER.—

"Which are not within the limits of any township or county."

The LORD CHANCELLOR.—Of course, with regard to that Act, we must see whether there was any such Act, and what was the effect of it.

Mr. MOWAT.—The counties were re-constituted by it and grouped into districts, certain of the districts comprehending also tracts of unorganized territory outside the limits of townships and counties. Section 40 reads:

"And be it further enacted, by the authority aforesaid, that the counties of Essex and Kent, together with so much of this province as is not included within any other District thereof, do constitute and form the Western District."

The Act of 59 Geo. 3 is printed immediately preceding, at page 409.

Sir MONTAGUE SMITH.—What you cite this for is to shew that under this Act they did exercise jurisdiction within these districts, and that they were treated as being within the Act?

Mr. MOWAT.—Yes, my Lord.

Lord ABERDARE.—Where are you?

Mr. MOWAT.—The petition I have just read is at page 413, and before parting with it I want also to read something from Chief Justice Powell's report on this subject, which is printed at page 416.*

* Report of Chief Justice Powell, of Upper Canada, dated 27 October, 1819, in reference to the matters complained of in the petitions of the Earl of Selkirk and the Hudson's Bay Company; transmitted to Earl Bathurst by Lieutenant-Governor Maitland.

Sir BARNES PEACOCK.—Do you shew that under that Act there was ever any trial by the Ontario judicial officers, in that part which is now included in the award, before the Hudson's Bay Company's settlement?

Mr. MOWAT.—Yes, there is some evidence of that, as I think I shall be able to shew your Lordship; I do not know whether under that Act or not, but, at all events, whether it was under this Act or not, there were trials.

Sir BARNES PEACOCK.—You say there were trials?

Mr. MOWAT.—Yes, my Lord.

Sir BARNES PEACOCK.—In the part included in the award, before the Hudson's Bay Company's settlement?

Mr. MOWAT.—Yes. I shall be able to shew your Lordship that. Will your Lordships allow me to read what Chief Justice Powell says, in the paragraph commencing "The outrages," at page 416. This is the statement that he makes:

"The outrages at Fort William were presented in the Western District of Upper Canada, that Post"—that means Fort William—"having been ever considered part of that District by the proprietors of the post, the governments, and the courts, yet the Supreme Court of Lower Canada had adjudged that it was without the Province of Upper Canada."

He complains there of the adjudication in Lower Canada being contrary to what it had always been considered—that it was always considered to be in Upper Canada.

The LORD CHANCELLOR.—The Supreme Court of Lower Canada had adjudged that it was without the Province of Upper Canada?

Mr. MOWAT.—Yes, my Lord.

Sir ROBERT COLLIER.—What became of all this? Chief Justice Powell complains that "the Supreme Court of Lower Canada had adjudged that it was without the Province of Upper Canada." What finally became of that? Was it finally treated as being within or without the province?

Mr. MOWAT.—In that particular case in which the judgment was pronounced, and in which the prisoner was found guilty, it was disposed of in this way: The Government sent to the Imperial Government the papers, the notes of the trial, and the points, in order that an opinion of the Law Officers might be obtained as to whether the locality was or was not in Upper Canada—whether the judgment of the court on that point was correct. The matter seems to have rested there for about two years. There was a correspondence about wanting the opinion, but if any opinion was given there is no record of it; at all events, we cannot find it. But we do find that the prisoner, who had been condemned upon the supposition that the act had been committed without the boundaries of Upper Canada, received a free pardon.

Lord ABERDARE.—Are you speaking of De Reinhard's case?

Mr. MOWAT.—Yes, my Lord. The question was whether the spot was situated in Upper Canada, or in the Indian territories, which would bring it within the jurisdiction of the courts of Lower Canada. My friend has not cited a case, or suggested that there was ever a case, in which that view which the Lower Canadian court held in the De Reinhard case was ever acted upon by anybody. As I have already said, it was acted upon by no government afterwards, it was acted upon by no court afterwards, either in Upper or Lower Canada, and whatever law there was required to be acted upon or put in force in this territory was the law of Upper Canada.

The Province of Manitoba has printed an Appendix in which is set forth a report of Mr. Ramsay, Q.C., afterwards Judge Ramsay, discussing this question of boundaries, and the report so printed has a memorandum added to it; and it

may shorten the matter a little if I read it, because it really shews what was done, and what was well known to have been done, in this territory, west of the due north line in Upper Canada. This is at page 71.*

Mr. McCarthy.—If my friend will allow me, it might shorten the time if I admit, as I ought to admit, as a matter of fact, that up to the height of land—that is between Lake Superior and the height of land—Upper Canada *did* exercise jurisdiction. I leave my friend to point out that which is beyond the height of land.

Lord Aberdare.—How far?

Mr. McCarthy.—It is about 40 or 50 miles. Your Lordship will see that marked on the map.

Lord Aberdare.—That land would not go so far as the Lake of the Woods?

Mr. McCarthy.—No.

Sir Robert Collier.—What do you call the particular height of land?

Mr. McCarthy.—Your Lordship will see it is marked on this printed map. [*Mr. McCarthy pointed out on the map the position of the particular territory.*]

Mr. Mowat.—The due north lines are here.

Mr. McCarthy.—Yes, I admit that they exercised jurisdiction between the due north line which we now claim as the proper line, and the height of land.

Mr. Mowat.—And that we always did so, so far as the information goes?

Mr. McCarthy.—I cannot say at all.

The Lord Chancellor.—There is an Act in 1803,

"For extending the jurisdiction of Courts of Justice in the Provinces of Lower and Upper Canada to the trial and punishment of persons guilty of crimes and offences within certain parts of North America adjoining to the said Provinces."

Mr. Mowat.—That is under commission.

The Lord Chancellor.—Therefore, giving an extra-territorial jurisdiction.

Mr. Mowat.—Yes, but not necessarily. The governor might at his discretion authorize it.

Sir Robert Collier.—You do not say the right to the land was exercised under that Act.

Mr. Mowat.—No. The documents here shew, with reference to that Act of 1803, that it was passed in consequence of murders committed in Athabasca. I am not quite sure how far my friend's admission extends. If he admits that

* Report of T. K. Ramsay, Esq., Q.C., on the Northern and Western limits of Ontario, dated March, 1873, and made at the instance of the Government of the Dominion. The Memorandum appended to it is as follows:—

Memo.—In the report submitted, the strictly legal view has alone been considered, because it alone seemed to be within the scope of my instructions; but from the course of my investigations I could not fail to see that beyond this there is another consideration not less important, and that is the equitable side of the question. In creating the Province of Ontario it is not possible to conceive that the Imperial Legislature intended to convey to that province and to the Province of Quebec less territory than the late Province of Canada actually enjoyed. Now, it is incontestable that up to 1867 the Government of Canada, *de facto*, extended to the height of land which forms the watershed of the water system of the St. Lawrence and the great lakes. This is made apparent by the registers of the Executive Council, by which we find that a Commissioner was appointed to obtain the surrender of the claims of the Indians to the lands in the vicinity of Lakes Superior and Huron, or of such of them as may be required for mining purposes. The Commissioner executed a treaty by which he obtained a portion of the very territory that would be cut off from the Province of Ontario if the dispositions of the Act of 1774 were literally observed. "From Batchewanaung Bay to Pigeon River, at the western extremity of the said lake [Superior], and inland to that extent to the height of land which separates the territory covered by the Charter of the Honourable the Hudson's Bay Company from the said tract, and also the islands in the said lake within the boundaries of the British possessions therein."

There are doubtless other acts of authority beyond the meridian indicated in the foregoing report. In the De Reinhard trial, Mr. Coltman, a magistrate for the District of Quebec, and a Commissioner in the Indian territory, in his evidence, said: "Il est notoire que les writs des Magistrats du District Ouest du Haut Canada sont émanés pour être exécutés à Fort William." It would, therefore, seem that in fairness to the Province of Ontario the old line of the height of land should be adopted as the western as well as the northern boundary of the Province of Ontario.

Montreal, March, 1873. T. K. R.

that part west of the due north line up to the height of land is territory in which Upper Canada always exercised jurisdiction, I have nothing more to say. That is all that, on this point, is needful for me to make out.

Lord ABERDARE.—Oh, no; it is a very small part indeed which was admitted by him.

Mr. MOWAT.—But so far as regards that which is west of the due north line, and up to the height of land, I must ask my friend to give me some admission.

Lord ABERDARE.—You made some case as to Fort William and so forth, and he says "Yes, as to Fort William that is all very well;" but beyond Fort William he does not admit anything.

Sir MONTAGUE SMITH.—He admits that which is beyond the due north line.

Mr. MOWAT.—Yes, that we exercised the jurisdiction. There is no doubt at all that we exercised jurisdiction beyond the due north line.

Mr. MCCARTHY.—Oh, yes. I think they did continually. I think, so far as Upper Canada is concerned, different townships have been laid out there under the municipal jurisdiction of Upper Canada. It is between the due north line and the height of land; and Fort William, as your Lordship sees, is in that territory.

Sir ROBERT COLLIER.—Yes.

Mr. MOWAT.—The jurisdiction so exercised is not only the jurisdiction of the courts, but also a jurisdiction as to granting land. Grants of land were from time to time made west of the due north line (there is evidence of that) by the Province of Canada before confederation, when the only right of doing so was that this territory formed part of Upper Canada; and very extensive mining grants were also made.

Sir ROBERT COLLIER.—Mining grants?

Mr. MOWAT.—Yes, my Lord.

Sir ROBERT COLLIER.—You are able to prove all that I suppose?

Mr. MOWAT.—Yes, my Lord, I can shew it at once.

Lord ABERDARE.—If it is admitted up to the watershed, there is no use shewing it. I think the learned counsel on the other side admitted that townships were also formed there.

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—And that would be exercising territorial jurisdiction also?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—But then the argument, as I understand, was this. I gather, if you once shew that the territory beyond that particular territory was a part of Upper Canada, that that would apply to the whole of the district included in the award; but this admission was limited to a portion of the district.

Mr. MCCARTHY.—That is so. I think my friend will not be able to shew any exercise of jurisdiction beyond the height of land. That was the limit.

Sir MONTAGUE SMITH.—Then you say, beyond that, that there have been grants of land?

Mr. MCCARTHY.—Yes, in that same territory.

Sir MONTAGUE SMITH.—In that same territory; but do you carry grants beyond the territory with respect to which the admission has been made? Perhaps that also will be admitted.

Mr. MCCARTHY.—Yes. That they exercised jurisdiction here as regards timber, and so on.

The LORD CHANCELLOR.—Up to the height of land?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—On the western side?

Mr. MCCARTHY.—No, I do not admit that.

Mr. MOWAT.—My friend does not admit it, so I shall have to prove it by and bye.

Sir ROBERT COLLIER.—You say jurisdiction was exercised up to the height of land. Is the height of land spoken of, the boundary of the jurisdiction and so on?

Mr. MCCARTHY.—Yes, I think it is so spoken of in several places; for instance in the treaty, which my friend will admit.

Sir ROBERT COLLIER.—Is there any Act of Parliament in which what is called the "the height of land" is mentioned?

Mr. MCCARTHY.—Yes. There was a treaty with the Indians in 1850, and that treaty took in all the land.

Sir MONTAGUE SMITH.—You are asked whether in any of the documents relating to the criminal jurisdiction, or in any Act of Parliament, it is mentioned?

Mr. MCCARTHY.—No, not in any document relating to criminal jurisdiction. I am speaking of an official document, and this was an official document.

Sir MONTAGUE SMITH.—That is another matter.

Mr. MOWAT.—Jurisdiction is only exercised in any part of Upper Canada according as population gets into it. There is a large part of the undisputed territory of Upper Canada which has not yet been surveyed, and which is quite unoccupied. There being no population there, there is no occasion for the exercise of jurisdiction.

Sir ROBERT COLLIER.—You get from this due north line; you have got the jurisdiction beyond it, and you have got grants of land beyond it. You do not admit that the height of land is the boundary?

Mr. MOWAT.—Oh, no.

Sir ROBERT COLLIER.—Then how far back do you go?

Mr. MOWAT.—The commissions—that of 1786 to Sir Guy Carleton especially*—carries the boundary to a point which is beyond the height of land.

Sir MONTAGUE SMITH.—And the Quebec Act?

Mr. MOWAT.—Yes. I rely on the Quebec Act, and the purpose of the Quebec Act; and I rely on the Order in Council of 1791, which declared that all Canada was to be included in Quebec, as enlarged for the purposes of the division; and then all the correspondence which is printed here shews that to have been always our contention.

Sir ROBERT COLLIER.—We have heard all that.

Mr. MOWAT.—Then there is an admission of the Dominion itself which I think is of some value. At page 122 of the supplemental Appendix of Ontario, there is printed the material part of a Dominion statute to readjust the representation in the House of Commons, and for other purposes.† That appendix is in two parts.

Mr. MCCARTHY.—We have not seen that.

Mr. MOWAT.—I suppose that does not matter. The Court will I suppose look at any papers that are material. That is so agreed, even if the papers should not be printed. This is a statute under which the settlements in the awarded territory are made part of the Ontario District of Algoma for the purpose of representation.

The LORD CHANCELLOR.—This is an Act of 1882.

Mr. MOWAT.—Yes.

The LORD CHANCELLOR.—How does that bear on the question?

* Printed *ante*, p. 44, note.

† 45 Vict., cap. 3, (1882), "An Act to readjust the representation in the House of Commons, and for other purposes."

Mr. MOWAT.—It is an admission by the Dominion—an admission in effect that the territory in question is part of Ontario, because it is given as a part of Ontario.

The LORD CHANCELLOR.—Where does that appear? Is it in the Act?

Mr. MOWAT.—Yes, it is in the Act. The recital refers to the census which has just been taken, and declares that the Province of Ontario requires to elect additional members in consequence of it; and so on. There is nothing more in the recital which is material for either of us. Then the first clause declares of how many members the House of Commons should consist, and the second clause recites:

"The said Provinces respectively shall, for the purposes of the election of members to serve in the House of Commons, be divided into the electoral districts established by the British North America Act, 1867, and the Act above cited, readjusting the representation, and the addresses of the two Houses of the Legislature of Prince Edward Island to Her Majesty, on the admission of that Province into the Dominion of Canada, and those constituted by this Act—each of the now existing electoral districts remaining constituted and represented as it now is, except in so far as it may be altered by the following provisions of this Act."

Then there are some provisions which are not material, but the material one is this:

"ONTARIO.

* * * * *

"The settlements westward of the Provisional District of Thunder Bay, and eastward of the Electoral Districts of Manitoba, shall, pending the adjustment of the boundaries, be and the same are hereby made part of the Electoral District of Algoma." * * * *

Sir ROBERT COLLIER.—It is merely an adjustment of the territories.

Mr. MOWAT.—Yes; but why should it be annexed to Ontario, if it is not part of Ontario?

The LORD CHANCELLOR.—What was the date of the award we had before us?

Mr. MOWAT.—1878. We ask, why, if the Dominion asserted that the award was wrong, and that this territory was no part of Ontario, why should they state that it was?

Sir MONTAGUE SMITH.—Pending the dispute, they rather adopt the award in the interval for this purpose.

Sir BARNES PEACOCK.—It says, "part of the electoral district of Algoma." What is that?

Mr. MOWAT.—That is an Ontario electoral district.

Lord ABERDARE.—It is not down in the map. What is the name by which this district principally went—Keewatin?

Mr. MOWAT.—Yes. Nothing turns upon it I suppose, but there is a tract called Keewatin in the North-West Territories. A strip between Manitoba and Ontario was at first included in Keewatin; a very narrow strip, assuming the award to be correct and the original boundaries of Manitoba to remain what they were.

Further, as bearing upon the point of the English River not being territory of the Hudson's Bay Company, and being within the bounds of Upper Canada, I may refer for a moment to the maps. My learned friends rely upon the maps. Whatever information existed at the time in England about this territory was really obtainable only from the Hudson's Bay Company, and the maps give such information as is understood to have been conveyed to the mapmakers by whom inquiries were made, by the Hudson's Bay Company, who alone had information on the subject. When the matter was before the arbitrators, the Dominion applied to the Hudson's Bay Company for any maps which would throw light upon the

question of boundaries, and the company furnished four maps. Only two of those I believe were of any importance or helped to throw any light in any way on the question in dispute, and unfortunately one of those two seems to be missing; but here is the other, which is called Mitchell's map,* and is the map stated in the evidence to have been before the commissioners when the Treaty of 1783 was made. This map is very much worn and appears to have been very much used. It comes as I have said from the custody of the Hudson's Bay Company, and in this map the boundary line is laid down north of the Lake of the Woods.

Sir ROBERT COLLIER.—Which line?

Mr. MOWAT.—The line which is spoken of on the map as being the bounds of the Hudson's Bay Company.

Sir ROBERT COLLIER.—That is the northern boundary of Canada?

Mr. MOWAT.—Yes.

Sir ROBERT COLLIER.—How about the western boundary?

Mr. MOWAT.—The line in question extends westward to a point north of the Lake of the Woods, and forms, in that extent, as well the northern limit of "Canada or New France," as the southern limit of the company's territory. Moreover, although the line stops in the meridian of the Lake of the Woods, the westward extension of Canada or New Fronce to the limit of the map, in longitude 103°, is indicated; but I only refer to it for the other purpose. There are a number of maps which in the same way give as the boundary a line north of the Lake of the Woods.

Sir ROBERT COLLIER.—But not as far west as the Lake of the Woods?

Mr. MOWAT.—Yes, my Lord, and as far west as the Lake of the Woods.

Sir ROBERT COLLIER.—Then that is in your favour.

Mr. MOWAT.—Yes, in that respect it is in my favour.

Sir ROBERT COLLIER.—Then let us see it. [*The map, Mitchell's, was shewn and explained to their Lordships*]. If they give a line as far west as the Lake of the Woods it is in your favour.

Mr. MOWAT.—There is the line, and there is the Lake of the Woods [*pointing them out*].

Sir ROBERT COLLIER.—According to that Canada would go on here [*pointing to the region of the Lake of the Woods*]. Where do they say their own territory, the Hudson's Bay, lies?

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* "A map of the British and French Dominions in North America . . inscribed to . . the Earl of Halifax, and the other . . the Lords Commissioners for Trade and Plantations . . by John Mitchell . . . published by the author, Feb. 13th, 1755 . . and sold by Andrew Millar . . Thomas Kitchin, sculp."

It appears from a printed memo. of the author, on the face of the map, that this is the second edition, and contains matter not in the first edition. In the margin is also printed the following:

"This map was undertaken with the approbation, and at the request of the Lords Commissioners for Trade and Plantations, and is chiefly composed from draughts, charts and actual surveys of different parts of His Majesty's Colonies and Plantations in America; great part of which have been lately taken by their Lordships' orders, and transmitted to this office by the Governors of the said Colonies and others.

"Plantation Office, Feb. 13th, 1755." "JOHN POWNALL,
"*Secretary.*"

In the Convention of the 29th September, 1827, between Great Britain and the United States, this map is referred to as that "by which the framers of the Treaty of 1783 are acknowledged to have regulated their joint and official proceedings." Their intention was to draw the international boundary line to the head waters of the St. Lawrence system; but they committed the blunder of running it through Long and Rainy Lakes and the Lake of the Woods (which all appear upon this map as discharging into Lake Superior), instead of drawing the line through the head stream of Lake Superior, which is in reality the River St. Louis (or du Fond du Lac). Had this been done it would have given to Canada a very large additional territory. The American commissioners can scarcely have been ignorant of the real facts, if, as is said to have been the case, they had beside them, and had the benefit of the knowledge of Mr. Peter Pond, a famous North-West trader, who was familiar with every step of the route followed by the line in question, and cannot but have known the true position of the western watershed of Lake Superior. Besides, this information was available, to any one who might seek it, in numerous French and English maps and books.

Mr. MOWAT.—That is the line which marks it on the map. It is differently coloured. Then there is another height of land which runs away far north, being that which divides the waters that pass into Hudson's Bay through Lake Winnipeg from those that fall direct into the bay, and if you take that as the height of land it would give us the English River.

Sir ROBERT COLLIER.—This is the boundary of Canada, and there is the Lake of the Woods.

The LORD CHANCELLOR.—It seems exactly so far to correspond with the boundary which has been laid down, unless the introduction of the smaller map there [*pointing to that engraved on the corner of the larger*] destroys its value.

Sir ROBERT COLLIER.—At all events they treat Canada as going as far west as the Lake of the Woods—perhaps farther. Then they claim to come down near to the Lake of the Woods. That is not very far from the line drawn by the arbitrators, is it?

The LORD CHANCELLOR.—This surely shews it somewhat farther south than the award does?

Sir ROBERT COLLIER.—Somewhat farther.

Mr. MOWAT.—The English River is not marked upon the map.

Lord ABERDARE.—The waters of the English River found their way into Hudson's Bay.

Mr. MOWAT.—Ultimately, after travelling a thousand miles.

Sir ROBERT COLLIER.—This [*pointing*] would seem to represent the Lake St. Joseph, and the other lake called the Lonely Lake, pretty much as it is here [*pointing on the Ontario boundary map*].

Mr. MCCARTHY.—But the Lake of the Woods is too far north on that map.

Sir ROBERT COLLIER.—As far as I can understand, that would represent the Lake of St. Joseph. I suppose this would represent the English River.

The LORD CHANCELLOR.—Which do you say is the Lake of the Woods? [*The lake was pointed out*]. Then it is very inaccurately laid down. But there is no doubt this would correspond exactly with the awarded boundary.

Sir ROBERT COLLIER.—Thereabouts, I think.

The LORD CHANCELLOR.—The Lake of the Woods seems to be shewn too far north.

Mr. MOWAT.—Yes, and that would afford room for the English River and some territory to the north of it in Canada.

Sir ROBERT COLLIER.—The Hudson's Bay Company treat all this pink as theirs. Then they treat the brown as Canada's.

The LORD CHANCELLOR.—That chain of lakes exactly corresponds with the northern boundary of the award. There can be no doubt of the extreme inaccuracy of the proportions and distances.

Lord ABERDARE.—Was that map before the arbitrators?

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—Produced by which party?

Mr. MOWAT.—The maps procured from the Hudson's Bay Company were put in by the Dominion. The idea was, as it is here now, to put in everything.

The LORD CHANCELLOR.—The Dominion will not deny, I suppose then, that some weight is to be given to it.

Mr. MOWAT.—Then there are other maps to the same effect. I have two of the original maps here. One is "A new map of North America from the latest discoveries." The date is 1763.* That is the very year of the cession, and this map gives the "Bounds of Hudson's Bay by the Treaty of Utrecht." I shall shew that that is a mistake; but it shews what was supposed to be the boundary.

* Map No. 130, in Notes on Maps, Ont. App., p. 121.

The Lord Chancellor.—There is the Lake of the Woods, but the other lakes are not laid down at all.

Mr. Mowat.—It shews the boundary line to be north of the Lake of the Woods. That is all I can argue for from this map.

Sir Robert Collier.—The company put themselves as above the Lake of the Woods.

The Lord Chancellor.—Is this a Hudson's Bay map?

Mr. McCarthy.—It was not a Hudson's Bay map.

Mr. Mowat.—No, but it is of value as agreeing with Mitchell's in respect of this line, and because of its antiquity. Then I have pinned to it another old map* of about same period, and also shewing the line to be north of the Lake of the Woods.

Sir Robert Collier.—That is the same thing.

Mr. Mowat.—It is a different map, by a different author, but it really shews the same thing. There are a great number of maps which shew the line in that way. I have referred particularly to Mitchell's, because it is the only map of any value which the Hudson's Bay Company forwarded when they were asked for maps for the purpose of illustrating the question.

As to the map furnished by the Hudson's Bay Company which has been mislaid, there is a statement here as to the effect of it. This statement was not disputed at the time, and no doubt will not be disputed here. It was a map dated 1748.† The statement, your Lordship will find at page 66 of the Joint Appendix:

"It bears the Royal Arms and the Arms of the Company, and seems to have been prepared by the Company in view of the Parliamentary inquiry of that period, and for the purpose of shewing the limits which the Company then claimed."

Sir Robert Collier.—You are now reading from the proceedings before the arbitrators?

Mr. Mowat.—Yes, the map being mislaid for the moment:

"The line which this map gives as the Company's southern boundary is considerably north of the height of land even as shewn on this map, for the line is therein made to cut Frenchman's River——"

Sir Robert Collier.—Who says this?

Mr. Mowat.—It is my statement for the arbitrators, and printed now for the present reference:

"—and several other rivers shewn on the map as flowing into Hudson's Bay. The Company does not by the map claim to the height of land, even so far as these comparatively small rivers are concerned. Their southerly line on the map runs to the eastern shore of a lake called Nimigon; thence to, and northerly along, the eastern shore of Winnipeg; and thence northerly to Sir Thomas Smith's Sound, in Baffin's Bay."

This is a manuscript map, coming from the custody of the Hudson's Bay Company, and not claiming any part of the territory which the arbitrators have given to us. We have the one map (Mitchell's) upon which I have been commenting, and here is the other one perhaps still more valuable, because it is in manuscript, and must be presumed to have been prepared for the company itself. I have mentioned here that it has the company's arms upon it, and the date indicates that it is the map which was probably prepared for use by the Parliamentary Committee in 1748.

* Map No. 129, in Notes on Maps, Ont. App., p. 121.

† "A map of North America, with Hudson's Bay and Straights, anno 1748.—R. W. Seale, sculp." It is numbered 80 in the Notes on Maps, Ont. App., p. 109.

The LORD CHANCELLOR.—It is unfortunate that it is not produced. Can we draw safe conclusions from a reported argument?

Mr. MOWAT.—There is some difficulty there; but in addition to the statement in my argument, we have in evidence the description of what this map contains. It is in the "Notes on Maps," map No. 80, at page 136o (169 of re-print) of the Book of Arbitration Documents, and at page 109 of the Ontario Appendix, both before your Lordships; and I cannot do anything better. Both sides made search for these maps, and Mitchell's map was found, but this map has not yet been discovered. It was left, after the arbitration, in the charge of the Dominion Government for re-transmission to the Company. Then there are a number of other maps which shew boundaries that would not include the territory in question.

Sir MONTAGUE SMITH.—Boundaries of what?

Mr. MOWAT.—Boundaries of the Hudson's Bay Company. Some of these are in Albany, and I have not been able to produce them.

Sir ROBERT COLLIER.—Where do they come from?

Mr. MOWAT.—I will tell your Lordship what they are. We made a list of the Maps and Notes which we had before the arbitrators, and which your Lordship will find in the separate Appendix of Ontario.* Page 116 is what I am going to refer to; map No. 110.†

The LORD CHANCELLOR.—There seems to have been an immense number of maps.

Mr. MOWAT.—Yes, my Lord, an immense number. The turn the thing has taken has been a little different from what we expected or perhaps some of these maps might have been procured. All I can do now is to refer to the Notes in regard to them. This is a confirmation of the inference one would draw from Mitchell's map, namely, that the territory in the award was not claimed by the Hudson's Bay Company at that time. The note is that the map

"Shews a line exactly the same as that of Mitchell's map of 1755, already mentioned; it is engraved and coloured, but has no inscription. The map extends further to the westward and to the eastward than Mitchell's, but the line stops, incomplete, at either end, at the same points as on his."

The LORD CHANCELLOR.—Mitchell's is the one we saw.

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—Which seems to make the chain of lakes the boundary to the north.

Mr. MOWAT.—Yes, my Lord. Map 120 is also a map which is at Albany. It, also, follows Mitchell's, and therefore perhaps it is not worth while to refer to it particularly. Then 132, on page 121, is another.‡

Lord ABERDARE.—Were all these maps before the arbitrators?

Mr. MOWAT.—These Notes were before the arbitrators, and some of the maps.

Sir ROBERT COLLIER.—Here you state "The western limit of the map is a little west of the Lake of the Woods."

Mr. MOWAT:

"A line, engraved and coloured, and marked 'Bounds of Hudson's Bay by the Treaty of Utrecht,' commences at the point in the western limit where the line on Mitchell's map of 1755 (hereinbefore mentioned), produced westerly, would end—" so that it con-

*The Notes on Maps, as printed for the arbitrators, are reprinted in Sess. Papers, Ont., 1879, No. 31, p. 135.

†"Carte des Possessions Angloises et Françoises du Continent de l'Amérique Septentrionale, 1755. Se Vend à Londres chez. . . Millar, Rocque et autres. . . ."

‡"A new map of North America. . . . 1763. J. Spilsburg, sculpt."

firms Mitchell's; only it carries the line further west—"and runs thence easterly in about the same position as that of Mitchell's, to the eastern limit of the map beyond Mistassin."

Then the following, 133, published about 1763, confirms the same view:

"A new map of North America, shewing the advantages obtained therein to England by the Peace.

"Has a line corresponding to that on Mitchell's map, of 1755 (hereinbefore mentioned), as far west as the terminal point of that line, and running thence south-westerly to the western limit of the map, in about long. 103° and lat. 49° 12'. The name Canada, on the face of the map, applies westward to the same limit. The sources of the Mississippi are in about their true position. Lake of the Woods has no feeders."

Then No. 144:*

"Contains a line marked 'Boundaries of Hudson's Bay by the Treaty of Utrecht.' It follows substantially the height of land from a point west of Lake Mistassin to a point north of Lake Nepigon (crossing however a river), whence it runs westerly, passing the Lake of the Woods at a distance of about half a degree north of that lake."

Sir MONTAGUE SMITH.—North of the lake?

Mr. MOWAT.—North of the Lake of the Woods.

Sir ROBERT COLLIER:

"Passing the Lake of the Woods at a distance of about half a degree north of that lake."

Mr. MOWAT.—So it would give to Canada the whole Lake of the Woods and something more. It was not actually measured.

Lord ABERDARE.—That would take it up about to English River.

Mr. MOWAT.—That is what I contend.

The LORD CHANCELLOR.—Where is Lake Mistassin?

Mr. MOWAT.—It is a lake of considerable size south-east of James' Bay, my Lord. The northern part of Lake Mistassin is in a line with the southern part of James' Bay, and some distance to the east. There are also other maps to which I will call your Lordships' attention by and bye, and which give as the line of the "Bounds of Hudson's Bay," the height of land running up to Split Lake, which would be north of the English River.

Lord ABERDARE.—Split Lake is on the Nelson River.

Mr. MOWAT.—Yes. That line would be quite north of any part of the awarded territory in this quarter. Split Lake is marked on the map on Nelson River. Your Lordship will see the line there.

Lord ABERDARE.—The line appearing on the English maps of the eighteenth century.

Mr. MOWAT.—Yes. It will not be disputed that that line is on some of these maps. It is north of the English River, and an authority therefore that the river would be in French territory. In some of these maps all the territory west of that line to Split Lake is marked as French Canada.

Then another point as to the limits of Canada is established by the negotiations in respect of the Treaty of Utrecht. The negotiations will be found at page 490. At page 500 the particular memorials on which I rely for this purpose will be found. Your Lordship will find at the foot of page 500 a memorial from Monsieur De Torcy to Mr. Prior. He gives an account of what has been done upon these negotiations. This was before the Treaty of Utrecht, by which the Hudson's Bay and Straits were given up to the English, and commissaries were to be appointed for the purpose of deciding how the territory was to be divided.

* "A map of the British Dominions in North America" (1774).

By the previous Treaty of Ryswick,* the right of France was recognized to what was practically all the forts of the bay, with one single exception. Then, England having recognized the right of France to all those forts, whatever territory should be considered as accompanying the forts of course went to France likewise. Then, in consequence of the success of the British arms, the Treaty of Utrecht was much more favourable to England, and England insisted upon getting the whole bay and straits, and insisted also upon France surrendering all the posts and forts that were on the bay, and, as I have said, commissaries were to be appointed for the purpose of determining exactly where the line should be.† The English Government gave to the Hudson's Bay Company authority to receive possession from France of these posts and forts on the bay. They were delivered accordingly, and there is a memorial from the Hudson's Bay Company‡ declar-

*The Treaty of Ryswick, 1697.

VII. The Most Christian King shall restore to the said King of Great Britain all countries, islands, forts and colonies, wheresoever situated, which the English did possess before the declaration of this present war. And in like manner the King of Great Britain shall restore to the Most Christian King all countries, islands, forts and colonies, wheresoever situated, which the French did possess before the declaration of war; and this restitution shall be made on both sides within the space of six months, or sooner if it can be done. And to that end, immediately after the ratification of this treaty, each of the said Kings shall deliver, or cause to be delivered to the other, or to commissioners authorized in his name for that purpose, all acts of concession, instruments and necessary orders, duly made and in proper form, so that they may have their effect.

VIII. Commissioners shall be appointed on both sides to examine and determine the rights and pretensions which either of the said Kings hath to the places situated in Hudson's Bay; but the possession of those places which were taken by the French, during the peace which preceded this present war, and were retaken by the English during this war, shall be left to the French by virtue of the foregoing article. The capitulation made by the English on the 5th of September, 1695, shall be observed according to its form and tenor; the merchandises therein mentioned shall be restored: the governor of the fort taken there shall be set at liberty, if it be not already done; the differences arisen concerning the execution of the said capitulation and the value of the goods there lost, shall be adjudged and determined by the said commissioners; who, immediately after the ratification of the present treaty, shall be invested with sufficient authority for the settling the limits and confines of the lands to be restored on either side, by virtue of the foregoing article, and likewise for exchanging of lands, as may conduce to the mutual interest and advantage of both Kings.

And to this end the commissioners so appointed shall, within the space of three months from the time of the ratification of the present treaty, meet in the city of London, and within six months, to be reckoned from their first meeting, shall determine all differences and disputes which may arise concerning this matter; after which the articles the said commissioners shall agree to shall be ratified by both Kings, and shall have the same force and vigour as if they were inserted word for word in the present treaty.

† The Treaty of Utrecht, 1713.

X. The said Most Christian King shall restore to the kingdom and Queen of Great Britain, to be possessed in full right forever, the Bay and Straits of Hudson, together with all lands, seas, sea-coasts, rivers and places situate in the said Bay and Straits, and which belong thereunto,* no tracts of land or of sea being excepted, which are at present possessed by the subjects of France. All which, as well as any buildings there made, in the condition they now are, and likewise all fortresses there erected either before or since the French seized the same, shall, within six months from the ratification of the present treaty, or sooner, if possible, be well and truly delivered to the British subjects having commission from the Queen of Great Britain to demand and receive the same, entire and undemolished, together with all the cannon and cannon-ball which are therein, as also with a quantity of powder, if it be there found, in proportion to the cannon-ball, and with the other provision of war usually belonging to cannon. It is, however, provided, that it may be entirely free for the Company of Quebec, and all other the subjects of the Most Christian King whatsoever, to go, by land or by sea, whithersoever they please, out of the lands of the said Bay, together with all their goods, merchandizes, arms and effects of what nature or condition soever, except such things as are above reserved in this article. But it is agreed on both sides, to determine within a year, by commissaries to be forthwith named by each party, the limits which are to be fixed between the said Bay of Hudson and the places appertaining to the French; which limits both the British and French subjects shall be wholly forbid to pass over, or thereby to go to each other by sea or by land. The same commissaries shall also have orders to describe and settle, in like manner, the boundaries between the other British and French colonies in those parts.

* There were two originals of this treaty, one in Latin, the other in French. This translation is that published by authority of the English Government at the time. The expression here rendered "and which belong thereunto," is, in the Latin copy, "*spectantibus ad eadem*," and in the French copy "*et lieux qui en dependent.*" Chalmers' Treaties, vol. 1; Le Clerq, Recueil, tom. 1; Proceedings of the Commissaries, 1719-20. [Note, Joint App., p. 504.]

‡ Memorial of 1719, addressed to the Lords Commissioners for Trade and Plantations (Joint App., p. 579). It deals with (1) "the surrender of the Straits and Bay," which, it is added, "has been made according to the tenor of the Treaty, at least in such manner that the company acquiesce therein;" (2) "the running of a line between the English and French territories," which, it is urged, should be done "without delay, for that the French have, since the conclusion of peace, viz., in 1715, made a settlement at the head of Albany River . . . whereby they intercept the Indian trade from coming to the company's factories, and will, in time, utterly ruin the trade, if not prevented;" (3) "making reparations to the company for their losses and damages," as to which it is set forth "that the French took from the company, in full peace, viz., between the years '82 and '88, seven ships with their cargoes, and six forts and factories, in which they had carried away great stores of goods, laid up for trading with the Indians . . ."

ing—my learned friends, I presume, will not dispute—that the company were satisfied with regard to the forts which were delivered. They were the forts which the treaty provided for. But there was no agreement as to how much territory should go.

It is clear that the territory intended was very near the bay; and it is very important to observe this, because whatever territory did not go to England under the Treaty of Utrecht, whatever territory remained to France after the Treaty of Utrecht, would be part of that Canada which was ceded to England in 1763. Whatever remained to France by the Treaty of Utrecht in 1713, went to England under the Treaty of 1763, and will not be claimed by the Hudson's Bay Company. At all events, it certainly cannot be claimed successfully. But not alone that: I claim that whatever territory was actually ceded by France to England under the terms of that treaty, and particularly the forts and territories confirmed to France under the Treaty of Ryswick, but ceded to England under that of Utrecht, went, not to the Hudson's Bay Company, but to, and they remained with, the Crown of Great Britain also as a portion of French Canada, and as such were, as to the westerly part, included, in 1791, within the bounds of Upper Canada.

Now we know there was only a limited amount of territory claimed by England previous to the Treaty of Utrecht, and for the purpose of the treaty The papers shew this. I refer to the memorial from Monsieur De Torcy to Mr. Prior, of 7th January, 1713, at page 500 of the Joint Appendix:

"The plenipotentiaries of Great Britain insist that it shall be expressed that France shall restore not only what has been taken from the English, but also all that England has ever possessed in that quarter. This new clause differs from the plan, and would be a source of perpetual difficulties, but to avoid them the King has sent to his plenipotentiaries the same map of North America as had been furnished by the plenipotentiaries of Great Britain. His Majesty has caused to be drawn upon this map a line which describes the boundaries in such a manner as he has reason to think they easily may agree upon this point on both sides. If, however, there should be any obstacle which the plenipotentiaries cannot remove, the decision must be referred to commissaries to be named for the adjustment of the boundaries of America."*

The Lord Chancellor.—Have you that map?

Mr. Mowat.—We have not the very map. The lines are drawn, however, upon the map that we have. The map itself we have very diligently, on both sides, endeavoured to get.

The Lord Chancellor.—This is of 1703.

Mr. Mowat.—This is De l'Isle's map of 1703, being map No. 33, described in the Notes, page 101 of the Ontario Appendix, with the lines in question drawn thereon in manuscript, the whole an exact reproduction of the map, with the

*Mr. Prior, in his despatch to Lord Bolingbroke, of 8th January, 1713, (Joint App. p. 501), says: "As to the limits of Hudson's Bay, and what the ministry here seem to apprehend, at least in virtue of the general expression, *tout ce que l'Angleterre a jamais possédé de ce coté la* (which they assert to be wholly new, and which I think is really so, since our plenipotentiaries make no mention of it), may give us occasion to encroach at any time upon their dominions in Canada, I have answered, that since, according to the *carte* which came from our Plenipotentiaries, marked with the extent of what was thought our dominion, and returned by the French with what they judged the extent of theirs, there was no very great difference, and that the parties who determined that difference must be guided by the same *carte*, I thought the article would admit no dispute. In case it be either determined immediately by the plenipotentiaries or referred to commissioners, I take leave to add to your Lordship that these limitations are no otherwise advantageous or prejudicial to Great Britain than as we are better or worse with the native Indians, and that the whole is a matter rather of industry than dominion. If there be any real difference between *restitution* and *cession, queritur?*"

As a part of the same official correspondence, may be given the following extract from the despatch addressed by the Duke of Shrewsbury to Lord Bolingbroke dated Paris, 22nd Feb., 1713: "The plenipotentiaries of Great Britain had hitherto made a distinction between places ceded . . . and the places which they denominated restored. . . . The plenipotentiaries now make no distinction between places ceded and places restored, though the same expression remains in article 14." (See *ante*, p. 55).

manuscript lines inscribed thereon in 1719-20, deposited in the Department of Marine and the Colonies at Paris.* I shall be able to shew to your Lordships published maps of that period, but subsequent to this date, on which there is printed a dotted line which accords with that upon the map which we bring here.

Sir. ROBERT COLLIER.—Are you speaking of this map now ?

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR.—I see upon the map in my hands a line, coloured, which is marked as the line alleged by the English, and that seems to go between Lake Nepigon and Lake Superior. It is impossible to make an exact comparison between these. It certainly would pass through the territory now given by the award to Ontario.

Mr. MOWAT.—That is one of the English maps.

Lord ABERDARE.—I see you have on the map with which you have furnished us [*the Ontario Boundary map of 1884*] a dotted line shewing the "Bounds of Hudson's Bay by the Treaty of Utrecht." On what is that founded ?

Mr. MOWAT.—I put that on as shewing that some of the maps have that statement upon them. There is no doubt the Treaty of Utrecht was never followed by any agreement. I observe my learned friends have put in a memorandum declaring that it is disputed that the bounds were never settled under that treaty ; and a sentence is copied from Dr. Phillimore's book on international law for the purpose of shewing it. But I can shew beyond any sort of doubt the bounds were never settled under that treaty. The assertion to the contrary is a mistake which got into a number of the maps and books.

Sir BARNES PEACOCK.—I think that the old map you produce [*Mitchell's*] has not any date upon it.

Mr. MCCARTHY.—Yes, my Lord. It is dated the 13th of February, 1755.

Mr. MOWAT.—In several of these maps which have been looked at, and in a number of other maps, the statement is made that the boundaries were settled under the Treaty of Utrecht. It is rather curious in connection with those statements that the lines laid down as the boundaries settled by the Treaty of Utrecht do not agree at all. On some of the maps it is the line of 49° ; in others it seems to follow the height of land ; and in another set of maps, the line so described runs away north to Split Lake. That fact alone indicates that there must be some mistake in saying that the boundaries were settled by the Treaty of Utrecht. My learned friends think it important to make out that they were so settled.

The LORD CHANCELLOR.—What is the clause of the treaty which relates to this matter ? It is at page 504, is it not ?

Mr. MOWAT.—Yes, clause 10.

The LORD CHANCELLOR :

"The said Most Christian King shall restore to the Kingdom and Queen of Great Britain to be possessed in full right for ever, the Bay and Straits of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the said Bay and Straits, and which belong thereunto, no tracts of land or of sea being excepted which are at present

*"Carte du Canada ou de la Nouvelle France, par Guillaume de l'Isle, de l'Académie Royale des Sciences, et premier Géographe du Roy. A Paris, chez l'auteur, 1703."

At page 101 of the Ontario App. it is stated of these lines : "On an original proof copy of this map, now deposited in the Bureau de la Marine, at Paris, there appears, as an autograph addition of the author and his brother, a line marked 'Ligne selon le mémoire de M. d'Auteuil.' This line commences at the entrance to and on the south shore of Hudson's Strait, and runs thence south-westerly (crossing the Rupert River) to about lat. 50½° ; thence due west to a point south-west of Fort St. Louis [Moose Fort] ; thence north-westward on a direct course to the parallel of 60°.

"Another autograph addition to the same map is a line, marked 'Ligne selon la prétension des Anglois,' and 'Ligne selon les Anglois' : it runs from the north shore of Davis' Inlet on the Labrador coast (in about lat. 56½°), south-westward, and through Lake Mistassin, to the 49th parallel, which it thence follows to the westerly limit of the map."

A fuller account appears in the Book of Arbitration Documents, p. 136*f* ; reprint, p. 160.

possessed by the subjects of France All which, as well as any buildings there made, in the condition they now are, and likewise all fortresses there erected, either before or since the French seized the same, shall, within six months from the ratification of the present treaty, or sooner if possible, be well and truly delivered to the British subjects."

Is there anything about boundaries there ?

Mr. SCOBLE.—In the same article, a little further on.

Mr. MOWAT.—It says that the commissaries should meet for the purpose of settling them.

The LORD CHANCELLOR.—I suppose they did.

Mr. MOWAT.—They met, but they came to no conclusion. It is very curious that on so many of these maps the statement is made as to the boundary, but it is a statement that we cannot admit. In the Oregon matter it was assumed that the commissaries had met, and had settled on the line 49° ; and yet it is perfectly certain that the fact is otherwise. If that line had been settled, it would be an important element in deciding the present matter, but it is quite clear upon the documents that nothing of the kind has occurred. I have mentioned one thing that makes this clear, and that is that we find the boundaries vary on the different maps. Another thing is that it is not pretended that you can find any such agreement, and it is nowhere suggested that anybody has been able to find any such. There is nothing to support the agreement but these maps on which the statement referred to is to be found.

Sir MONTAGUE SMITH.—Is the commission to the commissioners published ?

Mr. MOWAT.—Yes ; the authority under which they were to act is published, and is amongst the papers. It is at page 508.* The series commences at page 506.

Sir BARNES PEACOCK.—The papers relating to the proceedings under the Treaty of Utrecht ?

Mr. MOWAT.—Yes. There are also some further papers, one of which is now printed in the Ontario Appendix at page 34. I think the first in date is there. The title of it is given at page 33 :—" Memorial of the Hudson's Bay Company to the Lords of Trade and Plantations, 3rd October, 1750."

The LORD CHANCELLOR.—A long time after ?

Mr. MOWAT.—Yes, a long time after. My purpose is to shew that up to that time, 1750, the limits had never been settled. I suppose it may be assumed if it was not settled in 1750, inasmuch as the treaty was in 1713, it was not likely to have been settled at all, and it is only a few years after that that the whole territory is ceded to England. At the top of page 34 it says :

" That in pursuance of the said treaty, and the especial commission of Her said late Majesty Queen Anne, dated 20th day of July, 1713, the said bay and lands, then in possession of the French, were delivered up to, etc., and commissaries were appointed to settle the said limits and adjust the damages, etc., and proceedings were had by the said commissaries towards settling the same, but they were never able to bring the settlement of the said limits to a final conclusion."

Nobody was so interested in this matter as the Hudson's Bay Company themselves, and we have that statement of theirs in an official document addressed to the Lords of Trade and Plantations. Then the next paragraph is :

" The boundary line then proposed by the Hudson's Bay Company, to be settled on the limits on the continent between them and the places belonging to the French at the south end of the said bay, as appears from the several memorials and a map or a plan then

*The commissaries were D. Pulteney and Martin Bladen, and by the Instructions, dated 3rd September, 1719, they were empowered to act jointly and severally. The limits they were "to endeavour to get " were to begin at Grimington's Island, or Cape Perdrix, in 58½° north latitude, on the Labrador coast, and thence south-westward, by a line passing through Lake Mistassin, to the parallel of 49°, and thence "westward from the said lake, upon the 49th degree of northern latitude."

presented by the said Hudson's Bay Company to the Lords Commissioners of Trade, and still remaining in your Lordships' office, was the same as the line now proposed by your memorialists for the south-east and south boundaries;"

and so on. So there we have this statement, that up to 1750, nothing of the kind had taken place.

Then again, in 1759, we have another memorial from the Company, printed at page 587 of the Joint Appendix, in which they state in regard to the limits that "proceedings were had by the said commissaries towards settling the same; but they were never able to bring the settlement of the said limits to a final conclusion."

The LORD CHANCELLOR.—But the inference to be drawn, seemingly, is that when they refer to the map in the negotiations which followed the Treaty of Utrecht, they refer to an English map of that date. It is quite clear, from the passage at page 500,* that there was such a map.

Mr. MOWAT.—Yes, it is clear; but unfortunately we have not been able to find it.

The LORD CHANCELLOR.—And inasmuch as there was a general undertaking in very large terms to restore what had been considered to have been taken by the French from this country, in the absence of a settlement by the commissioners, I should suppose that the British map is that which must be referred to.

Mr. MOWAT.—Your Lordship will give it such weight as it is entitled to. We have not the map. We have some indications of what it contained, but we have not got either map.

The LORD CHANCELLOR.—We know there was a British map, and we know there was this general undertaking to restore:

"The king has sent to his plenipotentiaries the same map of North America as had been furnished by the plenipotentiaries of Great Britain. His Majesty has caused to be drawn upon this map a line which describes the boundaries in such a manner as he has reason to think they easily may agree upon this point on both sides. If, however, there should be any obstacle which the plenipotentiaries cannot remove, the decision must be referred to commissaries to be named for the adjustment of the boundaries of America."

That is the passage.

Mr. MOWAT.—It would be hard to bind us by the maps of private parties on a point of that kind.

The LORD CHANCELLOR.—Not at all. Secondary evidence is receivable in such a case, where you cannot get direct evidence. It is quite clear when Mitchell's map was published—the exact date appears. But the view of the Hudson's Bay Company was that under the Treaty of Utrecht it was within the boundary there marked. Then there was the map of 1703, when, I suppose, the elements of dispute were already existing, shewing a straight line, which runs between Lake Superior and Lake Alemipigon. No doubt there are a great many things laid down with a certain amount of inaccuracy on that map, and in matters of detail it would be comparatively of little use, but it shews that the then English pretensions were regarded by France as being to an apparently straight line, parallel and running beyond the end of Hudson's Bay eastward.

Mr. MOWAT.—Mr. Chief Justice Draper's paper, which is printed in the appendix, and which was submitted on behalf of the Province to the House of Commons Committee, pointed out the variations in the position which the Hudson's Bay Company took from time to time; and that while there are some maps mentioning the line your Lordship refers to, there are other maps which give another line.

* See the papers, M. de Torcy to Prior, and Prior to Lord Bolingbroke, *ante*, page 113, text and note.

The LORD CHANCELLOR.—This is a French map which comes from the government survey of France, and is stated to be identical with that which is found in the library of the Ministry of Marine at Paris It is dated 1703, ten years before the Treaty of Utrecht, and it is a map of Canada, or New France, and is one from the French point of view, and it lays down this as the line of the English pretensions. This is before the treaty, and the map shews what the French, ten years before the treaty, understood to be the English claim.

Mr. MOWAT.—But, my Lord, it is quite impossible that can be the case; and you will see this when you consider that by the Treaty of Ryswick the French had all the posts on the bay, with the exception of one. In 1703, that was not the English claim.

The LORD CHANCELLOR.—This is your map. Unless the parties had put this yellow line on it, which is hardly likely, because the words are in the French language, and are printed, it certainly represents what, in 1703, the French understood to be the English claim of the boundary between the two countries, and, as I say, that corresponds with an irregular line now drawn no doubt, but it was a perfectly regular and straight line drawn between Lake Alemipigon and Lake Superior to a point at the end of Hudson's Bay, and then running off through Lake Mistassin to a place south of Davis' Straits and Baffin's Bay.

Mr. MOWAT.—The original lines, with their inscriptions, appearing upon the copy of the map of 1703 which is deposited in the library of the Ministry of Marine and the Colonies at Paris, are not printed as suggested by your Lordship. We have the undoubted evidence in our printed documents, that those lines were put on in 1719, and in manuscript.*

The LORD CHANCELLOR.—It comes from your own clients.

Mr. MOWAT.—The map was put in for the purpose of shewing the forts that are there.

The LORD CHANCELLOR.—For whatever purpose it is put in, is or is not "*La pretension des Anglois*" part of it? If it has been put on for the purpose of this case we must entirely disregard it, but if it belongs to that date it shews what the French Government thought, ten years before the Treaty of Utrecht, was the English claim.

Mr. MOWAT.—I will have the evidence upon that point collated. and my learned friend who is with me will mention it to your Lordships.

The LORD CHANCELLOR.—This is a map of some importance with reference to the Treaty of Utrecht, because the French agreed to give up certain things, described in very general words, under the name of restitution—not cession. I think it was your observation, that the success of the English in the war that preceded the peace of Utrecht led rather to an enlargement of their claim.

Mr. MOWAT.—Yes. Ultimately the whole territory had to be ceded, England wa sso successful.

The LORD CHANCELLOR.—You mean after the great war in Lord Chatham's time?

Mr. MOWAT.—Yes. I will mention shortly the other evidence that there was no settlement. The memorial that I have referred to, dated in 1759, states:

"Commissaries were appointed to settle the said limits, and adjust the damages the company had sustained, which, for the ships and goods of the company taken by the French, appears, by an account stated in the year 1713, and delivered to the then Lords Commissioners of Trade and Plantations, amounted to upwards of £100,000, besides the damages the company sustained by the enemies' burning three of their forts and factories at Charlton Island, Moose River, and New Severn. And proceedings were had by the

* See, as to these lines, *ante*, p. 113, and p. 114, note.

said commissaries towards settling the same, but they were never able to bring the settlement of the said limits to a final conclusion, nor did the said Hudson's Bay Company ever receive any satisfaction for their said damages."

That is what the Company itself said:

"That the papers which were laid before the said commissaries and the minutes of their proceedings, as also a memorial relative to this matter which, in the year 1750, after the conclusion of the last war, was presented to your Lordships, remaining, as your memorialists believe, in your Lordships' office, it is conceived from thence will appear the best state of the rights of both Crowns, and of the territories and claims of the said company that can be laid before you Lordships, whereto your memorialists beg leave to refer.

"Your memorialists therefore humbly hope, in case any treaty of peace shall be set on foot between this nation and France, that your Lordships will intercede with His Majesty to take the premises into his royal consideration, and that he will be graciously pleased to cause your memorialists to have full satisfaction made them, pursuant to the said Treaty of Utrecht, for the aforesaid depredations they are thereby acknowledged to have sustained from the French in time of peace, and for which satisfaction is by the said treaty agreed to be made to the company, and that the limits of the said company's territory may be settled as by the said treaty is also agreed."

Then the Dominion Government, for whom my learned friends are presumed to appear here, in one of their despatches to the Secretary of State for the Colonies, dated the 8th of February, 1869,* which is to be found at page 287 of the Joint Appendix, make this statement (the particular statement I am going to read is at page 294, and it is a declaration of my learned friends' clients):

"As no definite boundary was established between the possessions of the French in the interior, and the English at Hudson's Bay, down to the Treaty of Paris, 1763, when the whole of Canada was ceded to Great Britain, the extent of the actual possession by the two nations for some period, say, from the Treaty of Utrecht to the Treaty of Paris, affords the only rational and true basis for ascertaining that boundary."

That is the very thing I am contending for before your Lordships now.

Then, letters are published in the Joint Appendix, shewing the searches that have been actually made, and the result of them, for any such decision. For example: Mr. McDermott was employed by the Dominion Government for this purpose, and the result of his examination appears at pages 717 and 718 of the Joint Appendix. He says this:

"The boundaries of the Hudson's Bay Company, as defined by the Treaty of Utrecht, are shewn on both editions of Mitchell's map as following the height of land which forms the watershed of rivers running southward to the lakes or northward to the bay. I do not find, however, in the Records and Correspondence of the Commissioners of Trade and Plantations (which consists of documents in French, Latin and English), any mention of a decision arrived at by the Commissioners appointed to fix this boundary matter and other disputed questions."

That is up to 1877.

The LORD CHANCELLOR.—Those are recent documents?

Mr MOWAT.—Yes; they are the recent investigations as to whether there had been a settlement or not. We have carried them up to a very late date indeed, and we have all been searching in every possible way: so that there is no doubt whatever that the boundaries were never settled. Mr. Chief Justice Draper, in his paper put in on behalf of Canada before the committee of the House of Commons, makes the same statement on pages 196 to 198 of the Joint Appendix.†

* Sess. Papers, Can., 1869, No. 25.

† Memorandum from Chief Justice Draper, Agent for the Province of Canada, submitted to the Colonial Secretary, 6th May, 1857, printed with the Report of the Select Committee, Imp. Ho. of Coms., on the Hudson's Bay Company, 1857, p. 374.

The LORD CHANCELLOR.—I thought you described a passage you read at page 294 as emanating from the Hudson's Bay Company. That seems to have been from their opponents, when the question was being agitated as to whether they had any rights or none.

Mr. MOWAT.—I did not read it as from the Hudson's Bay Company; I read it as being from the Dominion Ministers.

The LORD CHANCELLOR.—They were at that time endeavouring to persuade the English Government to treat the Hudson's Bay Company as having no rights.

Mr. MOWAT.—They are my opponents here.

The LORD CHANCELLOR.—You cannot deduce any argument from that.

Mr. MOWAT.—Your Lordships may very fairly make an inference from that.

The LORD CHANCELLOR.—What I infer is that they were very anxious to get rid of the Hudson's Bay Company altogether at that time.

Mr. MOWAT.—No doubt; but they would not say what was untrue. They have not been able to shew since that those statements were incorrect.

Lord ABERDARE.—I see that this very document which you have just now quoted assumes that the possessions of the Hudson's Bay Company are very large, because they say:

"They are there, however, by at least a show of right. Being there, they obstruct the progress of Imperial and colonial policy, and put in jeopardy the sovereign rights of the Crown over one-third (and as some think even a larger portion) of the North American continent."

Mr. MOWAT.—I do not know whether the reference there is to the Hudson's Bay Company's territories claimed under their charter, or to the whole territories over which they had the exclusive right of trading; because there was an enormous territory over which they had the exclusive right of trading under license, and which was not included in their charter.

Sir BARNES PEACOCK.—It seems to apply to Rupert's Land.

Mr. MOWAT.—Then there is French evidence that there had been no settlement, from the memoir of M. de la Galissonnière, in the Joint Appendix, page 514.*

The LORD CHANCELLOR.—I think it may be assumed that if the effect was that the commissioners never settled anything, England continued to claim to pass, under the restitution, what they had claimed before at least, if not more.

Mr. MOWAT.—But, then, would the Hudson's Bay Company be entitled to it? It is one thing for the Crown of England to have it, and another thing for the Hudson's Bay Company to have it.

In 1750, there was an attempt to settle the question between France and England, and then M. de la Galissonnière was one of the commissaries appointed for that purpose, and at page 514 he expressly states that nothing was done. At the foot of that page the statement which I refer to is to be found:

"The Treaty of Utrecht had provided for the appointment of commissioners to regu-

*EXTRACTS FROM M. DE LA GALISSONNIÈRE'S *Memoire* ON THE FRENCH COLONIES IN NORTH AMERICA, DATED DECEMBER, 1750.

Having treated of Canada in general, we consider ourselves bound to enter into some details respecting its different parts, and shall commence with those of the north.

Hudson's Bay, which was one of its most lucrative establishments, has been *ceded* to the English by the Treaty of Utrecht, under the denomination or title of *restitution*. They carry on a profitable trade there, but the excessive cold, and the difficulty of subsistence, will never permit them to form establishments there capable of affording any uneasiness to Canada; and if the strength of the latter country be agumented, as proposed, it will possibly be in a condition, in the first war, to wrest Hudson's Bay from the English.

The Treaty of Utrecht had provided for the appointment of commissioners to regulate the boundaries of Hudson's Bay; but nothing has been done in that matter. The term restitution, which has been used in the treaty, conveys the idea clearly, that the English can claim only what they have possessed, and as they never had but a few establishments on the sea cost, it is evident that the interior of the country is considered as belonging to France.

late the boundaries of Hudson's Bay; but nothing has been done in that matter. The term 'restitution' which has been used in the treaty conveys the idea clearly that the English can claim only what they have possessed."

The LORD CHANCELLOR.—That is a French argument.

Mr. MOWAT.—We have French testimony, in addition to English testimony, that the matter had never been settled; and there can be no doubt about the fact, because M. de la Galissonnière was one of those at that time authorized to endeavour to come to a settlement. He was himself one of the commissioners. We have an official French document a little later than that too, namely, the Instructions to M. de Vaudreuil, dated Versailles, 1st April, 1755, which are to be found at page 515 of the Joint Appendix. That is five years later:

"By article 10 of the Treaty of Utrecht, it had been agreed that commissioners should be named on both sides to settle the boundaries between the French and British American colonies. On occasion of an expedition that the English fitted out in 1718 against the fishing posts which the French had in the islands of Canso, the two courts did in fact nominate commissioners to decide the property of these islands. The commissioners met at Paris. At the very first conference, those of the King of England, who claimed that the islands of Canso were dependent on Acadia, which was ceded to the English by the Treaty of Utrecht, were convinced, on inspecting the map which they presented themselves, that those islands were, on the contrary, included in the reserves expressed in the article of the Treaty of Utrecht containing the cession of Acadia, and that consequently France had retained the property thereof. They withdrew, saying they required new instructions from their court, and did not again make their appearance. Although there had been question, on different occasions that since presented themselves, of naming other commissioners in execution of the treaty, the English had always eluded it until the last war; and Sieur de Vaudreuil is better informed than any person how they abused the moderation,"—here he inveighs against the English a little—"which had always governed His Majesty's proceedings and views, since he has been a witness of their increasing usurpations in the territory of Canada during the long peace which followed the Treaty of Utrecht."

Then a little lower down there is this statement:

"As yet the commissioners have not entered upon the limits of Canada."

The LORD CHANCELLOR:

"They [the English] have not yet explained themselves respecting the extent they propose giving their Hudson Bay boundaries; but it is to be expected that they will wish to stretch them to the centre of the colony of Canada, in order to enclose it on all sides."

I do not know what value you ascribe to this document. It does not seem to me to have much.

Sir MONTAGUE SMITH.—You use that simply to shew that no map had been made, or any boundaries settled.

Mr. MOWAT.—Yes, my Lord.

Sir MONTAGUE SMITH.—You have shewn that in various other documents. I do not know whether the other side deny it.

Sir ROBERT COLLIER.—You had better wait till the other side shew there was a settlement.

Sir MONTAGUE SMITH.—Because that is what you have been endeavouring to establish.

Mr. MOWAT.—I found amongst their papers indications of their intention to set that up, and therefore I thought it worth while to select the evidence to shew that there was nothing in it.

Then there is just one matter more which I will speak of, and I will then give place to my learned friend who is with me in the matter, that he may supply what I have omitted. I want to shew to your Lordships the position

taken with regard to all these matters by the Province of Canada, and by the Dominion. Your Lordships will see it is no new claim that the Province of Ontario is setting up. Ontario is merely continuing a claim which had been advanced for a considerable period before Confederation. The territory which the arbitrators gave us was really only a small part of what had been insisted on, in the strongest possible language, as belonging to Canada. I do not say that Canada had *invariably* asserted her right to so much. I do not say but that in some despatches expressions are found which imply that those who happened to be then members of the government, or in charge of the particular departments, may not have been alive to the rights of Canada, but the general scope of the position occupied before confederation is very plain from what I will call your Lordships' attention to. For instance, at page 289, your Lordships will find a despatch of the Canadian delegates to the Under-Secretary, of the 8th February, 1869.

The LORD CHANCELLOR.—That is again I suppose part of the controversy as to Hudson's Bay.

Mr. MOWAT.—Yes; I want to make out that the Hudson's Bay Company are not entitled to any part of the territory which the arbitrators have given us; at all events not to that part which Manitoba and ourselves have a dispute about. That is all that I am reading this for. This is about the middle of the page.

Sir ROBERT COLLIER.—The date of this is 1869.

Mr. MOWAT.—Yes, my Lord, it is so recent as that. It is the Dominion itself setting its claim up:

"It will be observed that two things are assumed in these proposals to the company, which the Canadian Government have always disputed.

"1st. That the charter of Charles II. is still valid, and grants the right of soil, or freehold, of Rupert's Land to the company.

"2nd. That Rupert's Land includes the so-called 'Fertile Belt,' extending from the Lake of the Woods to the Rocky Mountains.

"The law officers of the Crown in England have, on two or three occasions, given their opinion in favour of the first assumption, but never, so far as we are aware, in favour the second. The report of the law officers in 1857 admits that the geographical extent of the territory granted must be determined by excluding the country that 'could have been rightfully claimed by the French as falling within the boundaries of Canada,' (which the charter itself excludes by express words), and states that 'the assertion of ownership on important public occasions, as at the treaties of Ryswick and Utrecht,' should be considered; and also 'the effect of the Acts of 1774 and 1791.' The most recent opinion of the law officers of the Crown which we have seen (January 6th, 1868), as to the rights of the Hudson's Bay Company, does not, even by implication, support their present claim to the fee simple of nearly one-third of the American continent. On the contrary, Sir John Karslake and his colleague conclude their report with the emphatic statement that it is 'very necessary, before any union of Rupert's Land with Canada is effected, that the true limits of the territory and possessions held under the charter should be accurately defined.' An assumption, therefore, which covers so much ground, and is unsupported by any competent legal authority; which ignores the repeated protests and claims of Canada; and seeks to supply a basis upon which a surrender for valuable consideration may be made—is, to say the least, a most favourable assumption for the company. We notice these points in Mr. Adderley's letter before remarking on Sir Stafford Northcote's reply, to prevent the possible inference that we have acquiesced in them."

Then they present this argument in the same paper, at page 293, which I adopt, and read to your Lordship as being a correct view of the matter, and it was the statement of the Dominion itself at the time. Take paragraphs 1, 2, 3 and 4:

"1. The charter of Charles II. (and for the present we raise no question as to its

validity) could not and did not grant to the Hudson's Bay Company any territory in America which was not then (1670) subject to the Crown of England.

"2. The charter expressly excluded all lands, etc., then 'possessed by the subjects of any other Christian prince or state.'

"3. By the Treaty of St. Germain-en-Laye (1632) the King of England resigned to the King of France the sovereignty of Acadia, New France and Canada, generally, and without limits.

"4. 'La Nouvelle France,' was then understood to include the whole region of Hudson's Bay, as the maps and histories of the time, English and French, abundantly prove."

The LORD CHANCELLOR.—That is not an allegation that Canada had claimed it.

Mr. MOWAT.—That particular sentence is not, but the extract presents concisely the argument against the company having any territory that could come down to where we are now.

The LORD CHANCELLOR.—No, it goes very much farther than that. It speaks of the whole territory of the Hudson's Bay Company. It seems to me to have very little bearing indeed on the particular question before us.

Mr. MOWAT.—In 1763, my Lord, in all the maps of that early date, the whole region of Hudson's Bay is marked as if it belonged to New France or Canada, but of course when England got part of it that part ceased to belong to New France. The delegates continue, in paragraph 5:

"5. At the Treaty of Ryswick (1697), twenty-seven years after the date of the charter the right of the French to 'places situated in Hudson's Bay' was distinctly admitted; and although commissioners were appointed (but never came to any agreement) to 'examine and determine the pretensions which either of the said kings hath to the places situate in Hudson's Bay,' and with 'authority for settling the limits and confines of the lands to be restored on either side," the places taken from the English (*i. e.* from the Hudson's Bay Company) by the French previous to the war, and 'retaken by the English during this war, shall be left to the French by virtue of the foregoing (the 7th) article.' In other words, the forts and factories of the Hudson's Bay Company, established in Hudson's Bay under pretence of their charter, and taken possession of by the French in time of peace on the ground that they were an invasion of French territory, were restored by the Treaty of Ryswick to the French, and not to the company."

The LORD CHANCELLOR.—Does this add anything whatever to what you have pointed out already?

Mr. MOWAT.—Well, my Lord, I have been asked several times what position had been taken with reference to this territory, and I shewed that the old Province of Canada took this ground, and I shew that the Dominion of Canada has taken it since.

The LORD CHANCELLOR.—I cannot see in the passages here any suggestion that this was part of the Province of Canada.

Mr. MOWAT.—But that was the object of this statement.

The LORD CHANCELLOR.—No, it was rather that the Hudson's Bay Company had no right to it.

Mr. MOWAT.—I quite agree; but the inference to be drawn from that is that Canada had the right to it.

The LORD CHANCELLOR.—I do not see that any such inference is to be drawn.

Mr. MOWAT.—Well, I thought so, my Lord.

Another view of the matter occurred to me, which may be stated in a word or two. Thee were territories in dispute from time to time between France and England, but France at the time of the Treaty of Ryswick was recognized by England as the owner of all the territory about Hudson's Bay, with perhaps the exception of one fort, and whatever territory might be considered as connected with that fort which England reserved and the company possessed. Now,

what is the effect upon legal ownership of a transaction of that kind, when the limits have not been settled by commissioners, and there is no agreement as to how much territory is to go with those different forts? It is important to notice when we come to consider the effect of the Treaty of Utrecht, that very much more territory was to go to England under that treaty than under the Treaty of Ryswick; because under the Treaty of Ryswick nearly the whole of the territory went to France, while under the Treaty of Utrecht, the bay and straits, and whatever territory that would command, was given to England. Commissaries were to be appointed under that treaty likewise, but they never were appointed.

Now there was a large territory around Hudson's Bay previous to that treaty belonging to France. How are we to determine now as to the effect of the Treaty of Utrecht upon that? Where is the line to be drawn, and upon what principle can it be drawn? It seems to me that it may be regarded as unpartitioned property. The legal ownership of the property had been in France at the time of the treaty or the agreement. It was to be divided in some fashion between England and France, and I submit that the principles of partition would apply. I refer to that for this reason. I understand that when a court is called upon—or when commissioners are called upon—to partition a property as to which there is a joint ownership, they consider all the circumstances, and have a discretion in reference to what it is fair and just to determine, and where to draw the line. I ask your Lordships—if that is a principle which applies—to draw the line here so as to give us such territory as under all the circumstances the Province of Ontario might fairly claim. Upon all the grounds, I hope your Lordships will see your way to uphold the lines of the Award.

Sir Barnes Peacock.—Can you tell me whether schedules A and B which are annexed to the Order in Council are printed? The order in council is here, but not the schedules.

Mr. Mowat.—Your Lordships will find them in this book, in a different form and in a different order, but the materials are here.

Sir Barnes Peacock.—What is the page?

Mr. Mowat.—Does your Lordship mean the addresses of the Houses?

Sir Barnes Peacock.—Yes, the addresses of the two Houses of the Dominion Parliament to the Queen, as to the manner in which this land surrendered by the Hudson's Bay Company was to be decided.

Mr. Mowat.—The address forming schedule A is at page 266; and the resolutions and address comprised in schedule B are at pages 312 and 313 respectively.

Sir Barnes Peacock.—Do you contend that if the Hudson's Bay Company was in possession *de facto*—I will say only *de facto*—of this land which is included in the award, before the company's surrender, that can be now given up as an addition to Ontario?

Mr. Mowat.—Will your Lordships find it necessary to consider that? because they were certainly not in possession. It is perfectly certain that this territory—

Sir Barnes Peacock.—Is no part of what was surrendered.

Mr. Mowat.—The Hudson's Bay Company were not in possession at the time of the cession, in 1763.

Sir Barnes Peacock.—I mean at the time of the surrender in 1869.

Lord Aberdare.—At the time of the surrender by the Hudson's Bay Company to Canada.

Sir Barnes Peacock.—Yes, at the time of the deed of surrender of the 10th November, 1869, on page 315.

Mr. MOWAT.—They had posts there, but no exclusive possession. They were there only in common with the other subjects of Her Majesty. They had also same posts in the undisputed part of Ontario.

Sir BARNES PEACOCK.—If they were then in possession *de facto,* was not it a portion of the lands for which the £300,000 were paid by the Dominion?

Mr. MOWAT.—Not if it already belonged to Ontario.

Sir BARNES PEACOCK.—The Rupert's Land Act is this:

"For the purposes of this Act"—that is the Rupert's Land Act, 1868,—"the term 'Rupert's Land' shall include the whole of the lands and territories held, or claimed to be held, by the said Governor and Company,"

and then it authorizes this to be surrendered.

The LORD CHANCELLOR.—What is the page?

Sir BARNES PEACOCK.—Page 445; and then there is a condition:

"Provided, however, that such surrender shall not be accepted by Her Majesty until the terms and conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an address to Her Majesty from both Houses of the Parliament of Canada."

Mr. MOWAT.—Well, my Lord, the view that I take of that is this—

Sir BARNES PEACOCK.—I want to see those addresses if I can.

Mr. MCCARTHY.—The first joint address of both Houses of Parliament is at page 266.*

The LORD CHANCELLOR.—That was in 1867. That also seems to me to be a document very strong to shew that the notion of Rupert's Land and the North-Western Territory being part of Canada was absolutely rejected by the Senate and the House of Commons of Canada in December, 1867.

Sir BARNES PEACOCK.—The Act says, at page 446,† that Rupert's Land shall include all lands "held, or claimed to be held" by the Hudson's Bay Company; the lands which in fact they were selling for the £300,000.

Mr. MOWAT.—Yes, my Lord.

Sir BARNES PEACOCK.—Then you find, by the Order in Council, that those lands were to be legislated for by the Dominion of Canada. If they are put into the province, then they would come to be legislated for by the province.

The LORD CHANCELLOR.—These passages do not provide for the boundary of Rupert's Land and Canada, but they shew most conclusively that Rupert's Land extended into this region, and was in immediate proximity to this boundary of Canada.

Lord ABERDARE.—But the claim was that Canada extended indefinitely to the west.

Mr. MOWAT.—Yes, absolutely indefinitely. I do not think that anything will be inferred from that expression, the lands "claimed to be held" by the company.

Sir BARNES PEACOCK.—If they were *de facto* in possession, and Ontario was not in *de facto* possession, then were they not the lands which were sold for £300,000?

Mr. MOWAT.—The land that was sold was just the interest of the Hudson's Bay Company in the lands before they were surrendered. During the correspondence, there was a dispute as to how much belonged to the Hudson's Bay Company, and the Province on the whole was willing to give £300,000 for a surrender—a quit claim in fact. It was only a fraction of the value of the land.

Sir ROBERT COLLIER.—It was whatever they had.

* Address of December, 1867, in prefix to Dom. Stats., 1872.

† Imp. Act, 31 and 32 Vict., cap. 106—Rupert's Land Act, 1868.

Mr. MOWAT.—Whatever they had; but it would never do to hold that the effect of this Act was to take from any province what really belonged to it, because it had been claimed at some time or other by the Hudson's Bay Company. Your Lordships will further observe that they had made different claims at different times.

Sir BARNES PEACOCK.—Was not it intended that you were not to go back to 1763 to see what was a portion of Canada at that time, if the Hudson's Bay Company at recent dates had been in possession of these lands, and Canada had not exercised any dominion over them.

Sir ROBERT COLLIER.—Their possession would not be proved by that act.

Sir MONTAGUE SMITH.—You deny their *de facto* possession.

Mr. MOWAT.—Yes; but I do not say they were not there at that recent date in common with others of Her Majesty's subjects. They had no exclusive possession.

Sir MONTAGUE SMITH.—I dare say they may have had forts there at that date.

Sir BARNES PEACOCK.—There is no parol evidence to shew what was in possession of this company at the time of the surrender, or at the time of the passing of Rupert's Land Act, 1868.

Mr. MOWAT.—They were in possession, but their right was disputed. Their possession was not an exclusive one.

Sir ROBERT COLLIER.—We shall hear the other side upon this.

Mr. MOWAT.—Upon that Act I will add one more word, and then I will say nothing further. The fifth section, I think, shews what the intention of the Act was in that respect, namely, that it was not intended to take away from any province anything that would belong to that province if this Act had not passed because the fifth section provides this:

"It shall be competent to Her Majesty, by any such order or orders in council as aforesaid, on address from the Houses of the Parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada, and thereupon it shall be lawful for the Parliament of Canada from the date aforesaid to make, ordain and establish within the land and territory so admitted as aforesaid all such laws,"—

and so on. Now whatever territory passed by this, was territory in which the Parliament of Canada was to have the power of making the laws absolutely—not merely for provincial, but for all purposes. I submit that we cannot read the Act as meaning to take away from a province land which belonged to that province, even supposing the Hudson's Bay Company happened to be there. For instance, the Hudson's Bay Company had posts in the settled parts of Ontario with regard to which there is no dispute at all, where they traded with such Indians as they could get to trade there.

Mr. SCOBLE.—May it please your Lordships. In the observations which I shall address to your Lordships in following my learned friend, I shall endeavour to confine myself as much as possible to simply supplementing those portions of his argument which, from the very voluminous character of the papers, he has not been perhaps able to state as completely as they may be stated, and to direct the argument which I shall offer mainly to the point of supporting the award of the arbitrators, which of course may be supported by my shewing that there is a greater line which may have been given us, but which was not in fact given to us. And as the learned Attorney-General has intimated his consent to this line, which I think must strike your Lordships as being a very convenient line to establish from one point to another by natural boundaries, it will be only necessary for me to call your Lordships' attention to those facts which shew that the award of the arbitrators is within the rights which Ontario is entitled to set before your Lordships in supporting their claim to a division of the territory.

Now, my Lords, I take it to be perfectly clear that the Province of Ontario succeeded, by the British North America Act, 1867, to whatever formerly constituted the Province of Upper Canada. I take it to be quite clear that the Province of Upper Canada, as established by the Constitutional Act of 1791, had a perfectly defined and positive limit to the east, that the intention of the Constitutional Act was, as it is expressed in the second section of the Act, simply to divide the Province of Quebec which before this existed, into two separate Provinces, one of which was to be called the Province of Upper Canada and the other the Province of Lower Canada, and with the purpose of making that division by the Order in Council of the 24th of August, 1791, the limits were settled. The limit of the Province of Upper Canada was fixed to be (your Lordships will find the reference at the foot of page 399 of the Joint Appendix):

"To commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Boudet," and so forth, "running along the said limit in the direction of north thirty-four degrees west to the westermost angle of the said Seigneurie of New Longueuil; thence along the north-western boundary of the Seigneurie of Vaudreuil,"

And so on to the last few words at the end of the page:

"And from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada"

Now, my Lords, upon that there are two points. In the first place, the northern termination of this eastern division line of Upper Canada was fixed to be the boundary line of Hudson's Bay. It was not the boundary line of the Hudson's Bay Company. It was not the boundary line of the Hudson's Bay territory; it was the boundary line of the bay itself, and to that I apprehend no other interpretation can be given. The boundary line of Hudson's Bay was the coast line of Hudson's Bay; and the limits of Upper Canada, at that part of its extent, went far over the height of land to which reference has been incidentally made in the course of my learned friend's argument, and in the argument of counsel on the other side: far over the height of land, and directly away to the boundary of Hudson's Bay. We there get the first starting point of the line fixed by the award of the three commissioners. They begin there, and carry the line in a south-westerly direction down to the point above the Lake of the Woods where it touches the new Province of Manitoba.

Then, the second point which arises upon this description of boundaries in the Orders in Council—

The Lord Chancellor.—Which Order in Council?

Mr. Scoble.—The Orders in Council of the 24th of August, 1791, at pages 397 and 399 of the Joint Appendix.* I say that that fixes, beyond possibility of cavil, the eastern boundary from which the arbitrators, as I say rightly, made their boundary line to depart. But the second point which arises, my Lord, upon this is, that Upper Canada was to include—

"All the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada."

Now we must ascertain what the meaning of that phrase is, and it is a phrase which occurs not only in the Order in Council, but in the commission which was issued to Lord Dorchester, the first Governor-General appointed after this division was made. His commission will be found at page 400,† and it follows exactly the words of the Order in Council:

* Printed, *ante*, pp. 47-49, note.

† Commission as "Captain-General and Governor-in-Chief of our said Province of Upper Canada, d of our said Province of Lower Canada, respectively," dated 12th September, 1791.

"The Province of Upper Canada to comprehend all such lands, territories and islands lying to the westward of said line of division as were part of our said Province of Quebec, and the Province of Lower Canada to comprehend all such lands, territories and islands lying to the eastward of the said line of division as were part of our said Province of Quebec."

We have in that commission a clear interpretation of what was intended to be conveyed by the use of the term Canada in the Order in Council. "Canada" and the "Province of Quebec" are in these two documents treated as interchangeable terms; and your Lordships will find that in all the subsidiary acts of the Canadian Government which were entered upon in consequence of this division of the province into two parts, as for instance in the proclamation of Lieutenant-Governor Clarke, in 1791, at page 401.* The proclamation states that the country is to include—

"All the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada."

And Lieutenant-Governor Clarke, noticing the variation between the words used in the Order in Council and the words used in Lord Dorchester's commission, communicates with Mr. Dundas, then Secretary of State, upon the subject. His letter, dated 1st December, 1791, is at page 402, and he says:

"I think it my duty to remark to you, Sir, that the terms in Lord Dorchester's commission describing the boundaries of Upper and Lower Canada, are not the same as those used in the Order in Council, of the 24th of August."

Mr. Dundas, in reply to that, writes on the 10th of April, 1792. At the top of page 403 your Lordship will find the passage to which I am referring:

"Upon examination, I observe that Lord Dorchester's commission and the Order of Council, respecting the boundaries of the two provinces, are not precisely the same; but as the difference lies only in what is explanatory, it does not, I conceive, amount at all to a variance between them, and is therefore perfectly immaterial."

Therefore, I think I may take it, upon this part of the case, that in 1791, when the Constitutional Act was passed, the Province of Quebec was considered to be identical with the country called or known by the name of Canada.

The LORD CHANCELLOR.—You mean the province which was divided.

Mr. SCOBLE.—Yes; the Province of Quebec was precisely the same as the country known by the name of Canada, and, as Mr. Dundas says, the words were practically interchangeable.

The LORD CHANCELLOR.—But the proceedings of that date merely give you the line of division between the two provinces.

Mr. SCOBLE.—Yes, my Lord, but they give to Upper Canada all that is to the west and south of that boundary line, and the question is how much lying to the west and south Ontario is entitled to claim under that description.

Lord ABERDARE.—Which was the boundary line.

The LORD CHANCELLOR.—It is, in point of fact, far to the east.

Sir ROBERT COLLIER.—It is this one [*pointing*].

Mr. SCOBLE.—Yes, that blue line.

Sir ROBERT COLLIER.—You have all that is west of that.

Mr. SCOBLE.—We have all that is west of that, but how much it is remains to be seen. The point I make upon that is, that that boundary line, fixed in 1791, took us up to the boundary of Hudson's Bay, and gave us all to the west and south of that, even on the confines of Hudson's Bay. We go up to James' Bay at all events.

* Printed *ante*, p. 50, note.

Then in order to ascertain what the Province of Quebec which was thus divided in 1791 was, we must go back to the Quebec Act of 1774.

The LORD CHANCELLOR.—We must break off here. It may be convenient to counsel to know that the Council will not sit on Friday.

[*Adjourned to to-morrow.*]

THIRD DAY.

THURSDAY, July 17th, 1884.

Mr. SCOBLE.—When your Lordships rose yesterday, I was commenting upon the operation of the Constitutional Act of 1791, as continuing the Province of Upper Canada, constituted by that Act, with the same amount of territory as was given to the western portion of the Province of Quebec under the old description under the Quebec Act. And before I leave that part of the case, there is one other document to which I wish to refer your Lordships, and that is the proclamation of Governor Simcoe, which was published in 1792, consequent upon the promulgation of the Constitutional Act. Your Lordships will find that proclamation at page 403 of the Joint Appendix,* and in that proclamation, after reciting the

* PROCLAMATION OF LIEUTENANT-GOVERNOR SIMCOE, DIVIDING UPPER CANADA INTO COUNTIES, 1792.

J. GRAVES SIMCOE.

GEORGE THE THIRD, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, etc., etc. To all our loving subjects whom these presents may concern:

WHEREAS, in pursuance of an Act of Parliament lately made and provided, passed in the thirty-first year of our reign, and of authority by us given for that purpose, our late Province of Quebec is become divided into the two Provinces of Upper Canada and Lower Canada, and our Lieutenant-Governor of the said Province of Upper Canada, by power from us derived, is authorized, in the absence of our right trusty and well-beloved Guy, Lord Dorchester, Captain-General and Governor-in-Chief of our said Province of Upper Canada, to divide the said Province of Upper Canada into districts, counties, circles or towns and townships, for the purpose of effectuating the intent of the said Act of Parliament, and to declare and appoint the number of representatives to be chosen by each to serve in the Assembly of the said Province.

Know ye, therefore, that our trusty and well-beloved John Graves Simcoe, Esquire, our Lieutenant-Governor of our said Province of Upper Canada, in the absence of the said Governor-in-Chief, hath and by this Our Proclamation doth divide the said Province of Upper Canada into counties, and hath and doth appoint and declare the number of representatives of them and each of them to be as hereinafter limited, named, declared, and appointed: that is to say: That the first of the said counties be hereafter called by the name of the county of Glengarry, which county is to be bounded on the east by the lines that divide Upper from Lower Canada, on the south by the River St. Lawrence, and westerly by the easternmost boundary of the late township of Cornwall, running north twenty-four degrees west until it intersects the Ottawa or Grand River, thence descending the said river until it meets the divisional lines aforesaid; the said county is to comprehend all the islands in the said River St. Lawrence nearest to the said county, and in the whole or greater part fronting the same. * * *

That the seventeenth of the said counties be hereafter called by the name of the county of Suffolk: which county is to be bounded on the east by the county of Norfolk, on the south by Lake Erie, until it meets the carrying-place from Point au Pins unto the Thames, on the west by the said carrying-place, thence up the said River Thames until it meets the north-westernmost boundary of the county of Norfolk.

That the eighteenth of the said counties be hereafter called by the name of the county of Essex, which county is to be bounded on the east by the county of Suffolk, on the south by Lake Erie, on the west by the River Detroit to Maisonville's Mill, from thence by a line running parallel to the River Detroit and Lake St. Clair, at the distance of four miles, until it reaches the River La Tranche or Thames, thence up the said river to the north-west boundary of the county of Suffolk.

That the nineteenth of the said counties be hereafter called by the name of the county of Kent: which county is to comprehend all the country, not being territories of the Indians, not already included in the several counties hereinbefore described, extending northward to the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada. * * *

Of which our loving subjects and all others concerned are to take notice and govern themselves accordingly.

In testimony whereof, we have caused these our letters to be made patent, and the great seal of our said Province of Upper Canada to be hereunto affixed. Witness our trusty and well-beloved John Graves Simcoe, Esquire, our Lieutenant-Governor of our said Province of Upper Canada, and Colonel commanding our forces in Upper Canada, etc., etc., at our Government House, in the Town of Kingston, this sixteenth day of July, in the year of Our Lord one thousand seven hundred and ninety-two, and in the thirty-second year of our reign.

WM. JARVIS, *Secretary.* J. G. S.

effect of the Act in dividing the Province into two parts, Upper and Lower Canada, it proceeds

—"to divide the said Province of Upper Canada into districts, counties, circles or towns and townships for the purpose of effectuating the intent of the said Act of Parliament, and to declare and appoint the number of representatives to be chosen by each to serve in the Assembly of the said Province."

The number of the counties apparently constituted by that proclamation was nineteen, the nineteenth of which is called the county of Kent, and is thus described:

"That the nineteenth of the said counties be hereafter called by the name of the county of Kent, which county is to comprehend all the country, not being territories of the Indians, not already included in the several counties hereinbefore described, extending northward to the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada."

Now, my Lords, that constitution of the county of Kent appears to be important in two ways. In the first place, there appears to have been certain territories of the Indians—Indian reserves—which were not intended to be included in this county for electoral purposes, and the boundary of the county on the north was taken from Hudson's Bay itself, and westward and southward, to the utmost extent of the country commonly called or known by the name of Canada.

The LORD CHANCELLOR.—You will observe that in the Act of 1818, at the bottom of page 409, there is a reference to an Act of Upper Canada passed in 1798—that is six years after this date—for the better division of the province. I referred to it yesterday, and I find that that contains—it is 38th George III, chapter 5—a division into a great number of counties, and the last section, 40, is in these words:

"That the counties of Essex and Kent, together with so much of this Province as is not included within any other district thereof, do constitute and form the Western District."

Here, in the proclamation, you have been referring to the eighteenth and nineteenth counties: are those the two counties of Essex and Kent?

Mr. SCOBLE.—Yes.

The LORD CHANCELLOR.—In this Act nothing is said that indicates any boundary; but in the proclamation of Lieutenant-Governor Simcoe, there are very important words indeed:

"To comprehend all the country, not being territories of the Indians, not already included in the several counties hereinbefore described, extending northward to the boundary line of Hudson's Bay."

You say that "the boundary line of Hudson's Bay" means the sea.

Mr. SCOBLE.—Means the bay itself—the coast of the bay.

The LORD CHANCELLOR.—That appears to me to be a strong proposition from the words "boundary line."

Mr. SCOBLE.—I apprehend the boundary line of the bay can only be the coast line of that bay.

The LORD CHANCELLOR.—It does not refer to a natural boundary; it means a territory called the Hudson's Bay territory.

The LORD PRESIDENT.—It is an unheard of thing, and, as a geographical expression, I venture to say, utterly unknown.

The LORD CHANCELLOR.—Hudson's Bay territory of course: the words are perfectly sensible as applied to it.*

Sir ROBERT COLLIER.—You hardly require to take it so high as that.

Mr. SCOBLE.—I require to take it as high as Hudson's Bay on the east.

Sir ROBERT COLLIER.—James' Bay?

Mr. SCOBLE.—That is a portion of Hudson's Bay.

The LORD CHANCELLOR.—That would have no place in the county of Kent The counties of Kent and Essex are the westernmost part of Canada.†

Mr. SCOBLE.—Under the proclamation, the county of Kent was to include all the lands of Upper Canada (not being territories of the Indians) outside the limits of the other counties, and extending to the most northerly and most westerly bounds of the province. But it is quite sufficient for my purpose if your Lordships should take it in that way.

Lord ABERDARE.—You still leave undefined what is the limit of Hudson's Bay.

Mr. SCOBLE.—Yes. Of course, what I am most concerned about now is the western and southern portion of the district.

Sir ROBERT COLLIER.—In one respect it does go up to Hudson's Bay; it reaches James' Bay, which is part of it.

Mr. SCOBLE.—Yes, of course. Then, my Lords, that is all I think I need trouble your Lordships with, with regard to the arrangement of 1791, and I now must go back to the state of things established by the Quebec Act of 1774.

The Quebec Act is printed at page 366 of the Joint Appendix, and the preamble recites a royal proclamation of the seventh of October, in the third year of the reign of His Majesty King George III—that is 1763—whereby His Majesty

—"thought fit to declare the provisions which had been made in respect of certain countries, territories and islands in America, ceded to His Majesty by the definitive Treaty of Peace, concluded at Paris on the tenth day of February, 1763"—

Your Lordships will see that the preamble goes on to state:

"And whereas by the arrangements made by the said royal proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty, was left without any provision being made for the administration of civil government therein."

I shall presently have to call your Lordships' attention to the districts which were there referred to. Then comes a recital as to sedentary fisheries which is unnecessary to be dwelt upon, and then the enacting part goes on to declare—

"That all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St. Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude, on the eastern bank of the River Connecticut, keeping the same latitude directly west through the Lake Champlain, until, in the same latitude, it meets the River St. Lawrence; from thence up the eastern bank of the said river to the Lake Ontario; thence through the Lake Ontario and the river commonly called Niagara; and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank until the same shall be intersected by the northern boundary granted by the charter of the Province of Pennsyl-

* The words "boundary line of Hudson's Bay," appearing in the orders in council, and commission, of 1791, and in the proclamations of 1791 and 1792, and continuing in the Governors' commissions up to 1835, were changed in the subsequent commissions to the Governors—from 1838 to 1846—to the words, "shore of Hudson's Bay," thus indicating the true interpretation of the expression used in the earlier documents. The arbitrators in their award gave effect to this view, and their lordships in the end adopted it.

† The easterly boundary line of the counties of Essex and Kent, or either of them, as then constituted, produced northerly, would intersect the shore line of the Bay.

vania, in case the same shall be so intersected, and from thence along the said northern and western boundaries of the said province, until the said western boundary strike the Ohio; but in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at that point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania, and thence, by a right line, to the said north-western angle of the said province, and thence along the western boundary of the said province until it strike the River Ohio; and along the bank of the said river, westward, to the banks of the Mississippi."

Now, my Lords, until we come to the point where the boundary strikes the River Ohio, the long description that I have read refers only to the southern boundary of the province. The western boundary is commenced to be described from the point at which the Mississippi and the Ohio meet, and then

—"along the bank of the said river, westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

Now, if your Lordships look at the map which you have before you, you will find that the country between the Ohio and the Mississippi is a sort of triangular space, which appears to have been known in those days by the name of the Country of the Illinois, and my contention is that as that Country of the Illinois was entirely ceded to Great Britain by the Treaty of Paris, it must be taken to be dealt with by this Act. The boundary of it will be, on the one side, the banks of the Ohio, and, on the other side, the banks of the Mississippi; and I apprehend the banks of the Mississippi would have to be followed as far as they extended, until they reached the sources of that river.

The Lord Chancellor.—That bank is expressed in the commission.†

Mr. Scoble.—Yes; and it follows as a matter of necessary inference from the terms of the Treaty of Paris, which this Act of Parliament is intended to carry out.

I will refer your Lordships now to the Treaty of Paris, and perhaps it will be convenient at this point, before coming to the northern boundary, to deal only with the Act and Treaty, so far as the western boundary is concerned. The Treaty of Paris is printed at page 530 of the Joint Appendix.*

Lord Aberdare.—It is a fact, I think, that at this time the sources of the Mississippi were not known.

Mr. Scoble.—I will give your Lordships authority for that in a moment.—Article 4 of the treaty renounces all the pretensions of the French to Nova Scotia or Acadia, and at the top of page 531 your Lordships will find these words:

"His Most Christian Majesty renounces all pretensions which he has heretofore formed, or might form, to Nova Scotia or Acadia, in all its parts, and guarantees the whole of it, with all its dependencies, to the King of Great Britain; moreover his Most Christian Majesty cedes and guarantees to his said Britannic Majesty, in full right, Canada, with all its dependencies; as well as the Island of Cape Breton and all the other islands and coasts in the Gulf and River St. Lawrence, and in general everything that depends on the said countries, lands, islands and coasts, with the sovereignty, property, possession and all rights, acquired by treaty or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, islands, lands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample form, without restriction, and without any liberty to depart from the said cession and guarantee under any pretence, or to disturb Great Britain in the possessions above mentioned."

Then the seventh article, I think, becomes very important on the point I am now addressing myself to:

*Articles 4 and 7 of this Treaty are printed *ante*, p. 36, note.
†The commission to Sir Guy Carleton, of 1774.

"In order to re-establish peace on solid and durable foundations, and to remove for ever all subjects of dispute with regard to the limits of the British and the French territories on the continent of America, it is agreed that for the future the confines between the dominions of His Britannic Majesty and those of His Most Christian Majesty in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the River Mississippi from its source to the River Iberville"—

The LORD CHANCELLOR.—Where is the River Iberville?

Mr. SCOBLE.—It is down south, near New Orleans:

—"and from thence by a line drawn along the middle of this river, and the Lakes Maurepas and Pontchartrain to the sea."

Now, my Lords, the fixing of this line of boundary between the French and English possessions in America, from the source of the Mississippi south, extended, I submit, the British possessions ceded by the treaty to the whole of the French possessions which were on the east side of the River Mississippi, from its source southwards, and included therefore, as your Lordships I think will not be asked to doubt by my learned friends, this Country of the Illinois—this triangular bit of country between the two rivers, the Ohio and Mississippi.

Sir ROBERT COLLIER.—Is it called Illinois in the map?

Lord ABERDARE.—There is a bit called Illinois, but the fact is that the Illinois is a very large district.

Mr. MCCARTHY.—I think it is marked on the map.

Mr. SCOBLE.—I will shew your Lordships presently, the boundary of the Illinois as given at the time by the authorities.

Lord ABERDARE.—Does anything turn upon it?

Mr. SCOBLE.—I do not think much turns upon it. I do not think it will be contested that the Illinois country was part of the country ceded to Great Britain by the Treaty of Paris.

Mr. MCCARTHY.—There is no doubt about that.

The LORD CHANCELLOR.—Your argument is this, that the boundary line of Canada, under the Quebec Act, runs up the Mississippi, otherwise there would have been part of the British possessions omitted, and not included either in Canada or in any of the States?

Mr. SCOBLE.—Yes, a part would have been left entirely out.

The LORD CHANCELLOR.—And that argument is supported by the express terms of Sir Guy Carleton's commission?

Mr. SCOBLE.—It is.

The LORD CHANCELLOR.—And as you say, it is perfectly consistent with a reasonable interpretation of the Quebec Act itself?

Mr. SCOBLE.—Quite so; that is my whole argument on the point. The proclamation,* as your Lordships may remember, that is printed at page 351

*ROYAL PROCLAMATION OF 1763, ESTABLISHING QUEBEC AND OTHER PROVINCES.

GEORGE R.

Whereas we have taken into our royal consideration the extensive and valuable acquisitions in America, secured to our Crown by the late definitive treaty of peace, concluded at Paris the 10th day of February last; and being desirous that all our loving subjects, as well of our kingdoms as of our colonies in America, may avail themselves, with all convenient speed, of the great benefits and advantages which must accrue therefrom to their commerce, manufactures and navigation, we have thought fit, with the advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving subjects that we have, with the advice of our said Privy Council, granted our letters patent under our great seal of Great Britain, to erect within the countries and islands ceded and confirmed to us by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida, and Grenada, and limited and bounded as follows, viz.:

First, The government of Quebec, bounded on the Labrador coast by the River St. John, and from thence by a line drawn from the head of that river, through the Lake St. John, to the south end of the Lake Nipissim; from whence the said line, crossing the River St. Lawrence and the Lake Champlain in forty-five degrees north latitude, passes along the high lands which divide the rivers that empty themselves into the said River St. Lawrence from those which fall into the sea; and also along the north coast of the

of the Joint Appendix, dealing with the whole territory ceded by this treaty, divides the newly acquired country into various provinces—the government of Quebec, the government of East Florida, the government of West Florida, and the government of Grenada. The government of Quebec, the first of these four, is defined at page 352 to be bounded in this way:

"The government of Quebec, bounded on the Labrador coast by the River St. John, and from thence by a line drawn from the head of that river through the Lake St. John to the south end of the Lake Nipissim, from whence the said line, crossing the River St. Lawrence and the Lake Champlain in forty-five degrees north latitude, passes along the high lands which divide the rivers that empty themselves into the said River St. Lawrence from those which fall into the sea; and also along the north coast of the Baye des Chaleurs, and the coast of the Gulf of St. Lawrence, to Cape Rosiers, and from thence crossing the mouth of the River St. Lawrence by the west end of the Island of Anticosti, terminates at the aforesaid River St. John."

The LORD CHANCELLOR.—That tells us nothing about the western boundary?

Mr. SCOBLE.—No, it tells us nothing about the western boundary, and it was because the territory contained in the proclamation, or ascribed by the proclamation to the government of Quebec, omitted a great deal of territory for which it was necessary to provide a civil government, that the Quebec Act was passed,

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Baye des Chaleurs, and the coast of the Gulf of St. Lawrence to Cape Rosiers, and from thence crossing the mouth of the River St. Lawrence by the west end of the Island of Anticosti, terminates at the aforesaid River St. John.

Secondly, The government of East Florida, bounded to the westward by the Gulf of Mexico and the Apalachicola River; to the northward by a line drawn from that part of the said river where the Catahouchee and Flint Rivers meet, to the source of St. Mary's River, and by the course of the said river to the Atlantic Ocean; and to the east and south by the Atlantic Ocean and the Gulf of Florida, including all the islands within six leagues of the sea coast.

Thirdly, The government of West Florida, bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast, from the River Apalachicola to Lake Pontchartrain; to the westward by the said lake, the Lake Maurepas, and the River Mississippi; to the northward by a line drawn east from that part of the River Mississippi which lies in thirty-one degrees of north latitude, to the River Apalachicola, or Catahouchee; and to the eastward by the said river.

Fourthly, The government of Grenada, comprehending the island of that name, together with the Grenadines, and the Islands of Dominica, St. Vincent and Tobago.

And to the end that the open and free fishery of our subjects may be extended to, and carried on upon, the coast of Labrador and the adjacent islands, we have thought fit, with the advice of our said Privy Council, to put all that coast, from the River St. John's to Hudson's Straits, together with the Islands of Anticosti and Madelaine, and all smaller islands lying upon the said coast, under the care and inspection of our Governor of Newfoundland.

We have also, with the advice of our Privy Council, thought fit to annex the Islands of St. John and Cape Breton, or Isle Royale, with the lesser islands adjacent thereto, to our government of Nova Scotia.

We have also, with the advice of our Privy Council aforesaid, annexed to our Province of Georgia all the lands lying between the Rivers Altamaha and St. Mary's. * * *

And whereas it is just and reasonable, and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them, or any of them, as their hunting grounds; we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure, that no governor or commander-in-chief in any of our colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents, for lands beyond the bounds of their respective governments, as described in their commissions: as also that no governor or commander-in-chief of our other colonies or plantations in America do presume, for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents, for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west or north-west, or upon any lands whatever, which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved, without our especial leave or license for that purpose first obtained. * * * *

Given at our Court at St. James's, the 7th day of October, 1763, in the third year of our reign.

[By Imp. Act, 14 Geo. 3, cap. 83, sec. 4, (the Quebec Act, 1774), the above proclamation, "so far as the same relates to the said Province of Quebec," was "revoked, annulled, and made void, from and after the first day of May, one thousand seven hundred and seventy-five."]

extending those boundaries and supplying the civil government for all the subjects of the French who had become our subjects in consequence of the treaty, and who were residing in the district which is there described as "a very large extent of country, within which there were several colonies and settlements of the subjects of France;" and that district then unquestionably included the Illinois country.

Sir ROBERT COLLIER.—And part of the Illinois country is to the west of the line.

Mr. SCOBLE.—Now, my Lords, if the contention of the other side be true, that the western boundary is a line drawn due north from the confluence of the Ohio and Mississippi, you have the Illinois country cut in two. Those who were to the east got civil government; those to the west got no civil government at all. You have, therefore, the very mischief the Act intended to remove perpetuated by this construction of it, which I submit is neither a necessary construction, nor a reasonable construction, nor one which is consistent in any way with the circumstances under which the Act was passed.

Now, my Lords, if I am right in this contention as to the western boundary, it carries me this far at least, that on the west at any rate, the province of Quebec extended up to the source of the Mississippi. As far as the source of the Mississippi at all events, you have, fixed by the Treaty, and by the Act of Parliament, a boundary which was the natural boundary furnished by that great river; and Governor Carleton's commission, as the Lord Chancellor has already pointed out, gives that effect to the Act. In fact, every contemporary document gives that effect to the Act. Amongst the subsidiary commissions which were issued by the King to the Lieutenant-Governors of certain outlying posts of the Province of Quebec, we have a commission given to the Lieutenant-Governor of the Illinois country, at page 383.* It is the third commission on that page. It is dated the seventh April, 1775, and is addressed to Matthew Johnson, Esquire, Lieutenant-Governor and Superintendent at the Illinois:

"We, reposing especial trust and confidence in your loyalty, integrity and ability, do, by these presents, constitute and appoint you to be Lieutenant-Governor and Superintendent of the Post, and its Dependencies, established, or to be established, within the Illinois District, in our Province of Quebec."

I do not know whether it will be necessary for me to trouble your Lordships with any evidence as to the position of the posts in the Illinois district which were placed under the government of Mr. Johnson by this commission; but if necessary, I can shew to your Lordships that many of these posts were on the west side of this due north line for which my learned friend on the other side contends.

Sir ROBERT COLLIER.—There are some marked here, I see.

Mr. SCOBLE.—There is no doubt about it—I do not think it will be contested by my opponents—that there were posts and settlements in the Illinois country to the west of this due north line contended for on the other side, and, therefore, I do not think I need trouble your Lordships further with that.

*GEORGE THE THIRD, ETC.

To our trusty and well-beloved Matthew Johnson, Esquire, greeting:

We, reposing especial trust and confidence in your loyalty, integrity and ability, do, by these presents, constitute and appoint you to be Lieutenant-Governor and Superintendent of the Post, and its Dependencies, established, or to be established, within the Illinois District, in Our Province of Quebec, in America: To have, hold, exercise and enjoy the same, from and after the first day of May next, during our pleasure, with all the rights, privileges, profits, perquisites and advantages to the same belonging or appertaining: And you are to obey such orders and directions as you shall, from time to time receive from Our Captain-General and Governor-in-Chief of Our Province of Quebec, or from the Lieutenant-Governor or Commander-in-Chief of Our said Province for the time being.

Given at Our Court at St. James's, the seventh day of April, 1775, in the fifteenth year of Our Reign.

By His Majesty's command,

DARTMOUTH.

Here we have it perfectly clear, as I submit, on the right construction of the statute, and having regard to the whole of the circumstances which attended the constitution of this Province of Quebec, the line of the Mississippi established as the western boundary of the Province of Quebec, so far as it went.

Now, my Lords, with regard to the point as to what knowledge at that time was possessed with reference to the sources of the Mississippi, your Lordships, yesterday, noted upon Mitchell's map, when it was produced—

Sir Robert Collier.—Do you remember the date of it?

Mr. Scoble.—1755.

The Lord Chancellor.—That is a date which is different from the date which I have got on my notes?

Mr. Scoble.—My friend Mr. Robinson says it is 1755.

Mr. Robinson.—Yes, my Lord, that is correct.

Mr. Scoble.—I am sorry to say, my Lord, I have not seen that map, and therefore I am speaking only from my recollection of the impression which your Lordships seemed to derive from it, that the source of the Mississippi as shewn on that map is to be the north of the north-western angle of the Lake of the Woods.

The Lord Chancellor.—I do not remember that. What I do remember is that the northern boundary is shewn to be the whole of the lakes and river, which seems to me to be, though it may not be laid down in exactly the same way, to the north of the Lake of the Woods.

Sir Robert Collier.—It lays down Canada, which is coloured brown, as going as far as the Lake of the Woods?

Mr. Scoble.—Yes, my Lord.

The Lord Chancellor.—There is a point which at present we have heard nothing about, and that is the drawing of the western line, which the award seems to have done from Lake Itasca, which seems to be one of the sources of the Mississippi, though not apparently the northernmost source?

Mr. Scoble.—That is a point to which I am coming, but I wish first of all to give your Lordships authority for the statement which I made just now in answer to Lord Aberdare, that at that time, in the then condition of geographical knowledge, the source of the Mississippi was unknown, and that it was supposed to be very far more north than where it actually is. Now, in the Ontario Appendix, page 56, there is a report of Mr. Thompson, who was astronomer and surveyor to the North-West Company, and who seems to have travelled over this country with a view of settling the boundary, in the year 1796, at the time when the question of the boundary between the British dominions in America and the United States was under discussion. At line 20, the report states:

"The services of Mr. Thompson were very acceptable to these gentlemen, that is, to the Agents of the North-West Company in those parts. They desired to learn the position of their trading houses with respect to one another and also to the . . boundary line between Canada and the United States. . . The source of the Mississippi was then known only to the Indians and a few fur traders, and was supposed to be further north than the Lake of the Woods."

Lord Aberdare.—And it was supposed to be westward from it apparently, from the description of it given in one of these documents which we have had?

Mr. Scoble.—Yes, my Lord, I have heard—I do not know of my own knowledge whether it is so, but I have heard, and I think one of your Lordships made the observation—that in that map of Mitchell's, which is really a very important map historically, because it was the only map before the English and

American plenipotentiaries when the Treaty of Versailles was negotiated, the source of the Mississippi is taken to be north of this north-west angle of the Lake of the Woods.

The LORD CHANCELLOR.—How does the map appear to be dated 1755? It was supposed to be dated 1783, or earlier, from which I inferred that the date was uncertain?

Mr. SCOBLE.—My learned friend, Mr. Robinson, tells me that the date is on the map.

Mr. ROBINSON.—Yes, the date is on the map.

Sir ROBERT COLLIER.—It is said to be 1755.

Mr. MCCARTHY.—[*After referring to the map*] It is dated 1755.

The LORD CHANCELLOR.—Then that becomes a very important map.

Mr. SCOBLE.—Yes, my Lord. Then at page 62 of the same report, your Lordships will find, in the last paragraph on that page, a statement of the origin of the Mississippi River, in Turtle Lake:*

"Turtle Lake, the head of the Mississippi River, is about four miles square. Its small bays give it the shape of a turtle. This lake was supposed in 1783, to be further north than the north-west corner of the Lake of the Woods, and this supposition led to the error in the treaty of that year. The error arose from the fur traders who ascended the Upper Mississippi counting every pipe a league, at the end of which it was the habit to take a rest. Mr. Thompson found these pipe distances to be as unsubstantial as the smoke itself, and that each, instead of three, only measured two miles And the error was, not to make due allowance for the sinuosities of the river. By this false method of reckoning the notion had arisen that the head waters of the Mississippi were 128 geographical miles farther north than Mr. Thompson's survey proved them to be. The north bank of the lake is in latitude 47° 38′ 20″,"

and so on.

Lord ABERDARE.—Where is Turtle Lake?

Mr. SCOBLE.—It is shewn on the map.

The LORD CHANCELLOR.—It is a very small lake.

Lord ABERDARE.—Turtle Lake is the northernmost source of the Mississippi, as Itasca is the furthest point from which it draws its supplies.

Mr. SCOBLE.—I think so, my Lord.

The LORD PRESIDENT.—It is the point furthest north.

Mr. SCOBLE.—The fact of the ignorance which prevailed as to the extent of the Mississippi River is, I think, somewhat important with regard to this enquiry, because, as the King of France ceded to England all the country east of the Mississippi, from the source of that river down to the sea on the south, I apprehend that the boundary line of Canada, at the time of the treaty, and at the time of the Quebec Act, was supposed to go very considerably north of the Lake of the Woods, and that when you got to the source of the Mississippi River, continuing the western boundary, you would have to take, as that continued boundary, whatever was the dividing line on the north between Louisiana, which remained to the French under the Treaty of Paris, and Canada, which by the treaty was ceded to England, and that therefore the true western boundary of Canada, as defined by the treaty and the Act of Parliament, was a line which extended along the banks of the Mississippi to the source of that river, and then followed westerly whatever was at that time the dividing line between Canada and Louisiana.

But before I leave this point, of the due north line taken from the confluence of the Mississippi and Ohio rivers up across the American boundary into Canada, I think I may here conveniently refer, although I shall not do so at any length,

*See *ante*, p. 39, note.

to the state of the judicial decisions on the subject in Canada. Your Lordships have already heard, I think, so much about Reinhard's case, that it is not necessary for me to go over the facts of that case again. I think my learned friends are entitled to whatever the value of the decision of the judge in that case may be; but I think I ought to mention here that that case has not been followed even by the courts of Lower Canada. There is a judgment of Mr. Justice Monk in a case of *Connolly* v. *Woolrich*, which is at page 687 of the Joint Appendix.* Mr. Justice Monk was a Lower Canada judge. He was a Justice of the Superior Court of the Province of Quebec. It is a comparatively recent judgment, and was delivered on the 9th of July, 1867. The question was as to the legality of the marriage of a Lower Canadian at Rat River, in the Athabasca district (latitude 58° north, and 111° west longitude). One of the points in the case was whether the place was within the territory of the Hudson's Bay Company, and the learned judge, after going through a very careful investigation of the authorities upon the point, held that this Athabasca country was not included in the limits of the Hudson's Bay Company, but belonged to the Crown of France, because, he says, "it appears to me to be beyond controversy"—

Sir MONTAGUE SMITH.—Where are you reading?

Mr. SCOBLE.—Page 691, at the foot, is the passage which I am reading. I do not propose to trouble your Lordships with the whole of the judgment, but merely to give your Lordships the effect of it. He says that this Athabasca is part of this north-western territory, beyond the limits given us by the award.

The LORD CHANCELLOR.—Athabasca is a good deal to the north-west.

Mr. SCOBLE.—Yes.

Lord ABERDARE.—And in another water system?

Mr. SCOBLE.—Yes, but still, according to the judgment, it was included within the limits of Canada, and not within the territories granted to the Hudson's Bay Company.

The LORD CHANCELLOR.—What do you say—that Athabasca is within the the limits of Canada?

Mr. SCOBLE.—Yes, my Lord.

The LORD CHANCELLOR.—That would be, so far as it goes, fatal to the minor argument which you were going to put forward to me.

Lord ABERDARE.—That is to say, within the territory of the Dominion; not necessarily within the territory of old Canada, but within the territory of the Dominion of Canada, out of which Athabasca has been carved as a District?

Mr. SCOBLE.—Within the territory of French Canada, and therefore excluded from the Hudson's Bay Company's charter.

The LORD CHANCELLOR.—It is impossible for it to have been in old Canada, for Rupert's Land comes between?

Lord ABERDARE.—Yes, quite impossible.

Mr. SCOBLE.—But it is held to be within Canada, because it belonged to the Crown of France, and France was in possession of all the intervening territory, to the exclusion of the Hudson's Bay Company?

The LORD CHANCELLOR.—Where is this place?

Mr. SCOBLE.—It would be somewhere about here [*pointing on the map*].

The LORD CHANCELLOR.—The learned judge seems to have taken a view which is in accordance with the widest argument which you submit to us?

Mr. SCOBLE.—Yes, in accordance with the widest possible argument. I refer to that, not so much as being in any way conclusive upon the point, although the learned judge did consider Reinhard's case in delivering his judgment here, but as

*Reported in Lower Canada Jurist, vol. xi., p. 197

shewing that there is no consensus of judicial opinion in Canada in favour of this due north line, but that there is a good deal of authority on the other side, giving the whole of this country to Canada, under the Treaty of Paris, and under the Quebec Act.

The LORD CHANCELLOR.—What strikes me at present, about this particular decision, is that Athabasca would not fall within the line in any conceivable construction of the limit in the Quebec Act. If you take the line from the conjunction of the Ohio and Mississippi, of course Athabasca would be a great deal further to the west?

Mr. SCOBLE.—Yes, my Lord.

The LORD CHANCELLOR.—If you take the line of the award, that also would strike Hudson's Bay much to the east of the Athabasca country?

Mr. SCOBIE.—Yes, my Lord.

The LORD CHANCELLOR.—And the consequence is, that on no possible hypothesis can such a notion be reconciled with the boundaries in the Quebec Act?

Mr. SCOBLE.—Except on the assumption that the intention of the Quebec Act was to include in the Province of Quebec the whole of the territory which is ceded by the Crown of France; and the whole of the French posts and settlements referred to in the preamble of that Act, and which extended to the base of the Rocky Mountains.

The LORD CHANCELLOR.—How can you go against the express terms of the Quebec Act, which beyond all doubt point out the boundaries? And even if you take the mention of the Hudson's Bay territory as carrying you up to the shores of Hudson's Bay, that would still exclude this Athabasca territory. It is impossible to suppose that this judgment could have meant that.

Lord ABERDARE.—And all, I believe, that was claimed by the Hudson's Bay Company, were the sources of the rivers which flowed into Hudson's Bay?

Mr. SCOBLE.—They went down to the 49th parallel at one time, my Lord, the boundary line between Canada and the United States.

Lord ABERDARE.—You mean that they passed over the dividing ridge?

Mr. SCOBLE.—Yes, my Lord: they varied their claims at various times in order to suit the exigencies of their position, and at one time they went down as far as the 49th parallel.

There is another opinion, of an Upper Canada judge, which is perhaps not of much more value than either Chief Justice Sewell's judgment in the Reinhard case, or Mr. Justice Monk's judgment, which is the opinion of Mr. Justice Powell, at page 151 of the Ontario Appendix,* the smaller book,

* CHIEF JUSTICE POWELL, OF UPPER CANADA, TO LIEUTENANT-GOVERNOR MAITLAND.

YORK, May 1st, 1819.

SIR,—I have perused with a lively interest the copy of a letter from the Earl of Selkirk to the Earl of Liverpool, dated in Grosvenor Place, the 8th of February last, and beg leave to express my grateful acknowledgement to your Excellency for the communication. On the subject of the bill passed in the last session of the Provincial Legislature, his Lordship has not only handed unfounded surmises, but has advanced as fact that which is not true. He is pleased to say that the Act of the 31st of the King, cap. 31, divided the Province of Quebec, and makes no alteration in the western limits established by the 14th Geo. III., cap. 83. The Canada bill does not divide the Province of Quebec; it premises that it was His Majesty's intention to divide that province into two provinces to be called Upper and Lower Canada, and makes provision for their government when so divided. His Majesty, by his Order in Council, subsequent to the passing the Act, did accordingly separate the Province of Quebec into Upper and Lower Canada, and does make a great alteration in the western limits from those established by the 14th of the King, extending them westward without reference to the limits of Quebec, in such terms as plainly indicate the intention to comprehend all the country conquered from France, under the name of Canada, which had not been relinquished to the United States of America, or secured to the Hudson's Bay Company, or designated as Lower Canada.

Earl Selkirk is pleased to say that the Chief Justice of Upper Canada declared that his jurisdiction extended to the Pacific Ocean; his Lordship must have been misinformed; I never did pretend to pro-

in which, in reference to the controversy which was pending in the year 1819, between Lord Selkirk's partizans and the Canadian authorities, he expresses his opinion in a letter to Lieutenant-Governor Maitland.

The LORD CHANCELLOR.—This is not even a judicial opinion?

Mr. SCOBLE.—It is not a judgment, but he was called to account by Lord Selkirk in a letter to the English government, as to certain expressions which Chief Justice Powell was alleged to have used, and then he was required to explain, and he does explain. He says that the intention—your Lordships will find it about line 15—of the government in separating the Province of Quebec was to extend the western limits of Upper Canada—

—"without reference to the limits of Quebec, in such terms as plainly indicate the intention to comprehend all the country conquered from France under the name of Canada, which had not been relinquished to the United States of America, or secured to the Hudson's Bay Company, or designated as Lower Canada."

The LORD CHANCELLOR.—Do you mean to suggest that the opinion expressed in this letter of Chief Justice Powell is to weigh with us without our considering the grounds of it?

Mr. SCOBLE.—I mean only this, that De Reinhard's case will no doubt be relied on by the other side in favour of the contention that the due north line ought to be varied from the confluence of the Ohio and Mississippi, and I only cite this as—

Sir MONTAGUE SMITH.—As a counterpoise?

Mr. SCOBLE.—As shewing that there is no agreement of judicial authorities as to that contention.

The LORD CHANCELLOR.—What strikes me is that this passage in the letter is a reference to a particular Order in Council, the terms of which he says plainly indicate a certain intention. I suppose we have got the Order in Council?

Mr. SCOBLE.—Yes, my Lord; we have.

The LORD CHANCELLOR.—I think we should see whether the terms of it bear out that contention, and if so how it bears on this controversy?

Mr. SCOBLE.—That, my Lord, would be the Order in Council of 1791, which you have already had before you.

The LORD CHANCELLOR.—We have seen that, and we have seen plainly that there is nothing whatever in it about the westward boundary?

Mr. SCOBLE.—Nothing definitely *marking* the western boundary, but it contains the declaration that the easterly boundary of Upper Canada was to run northward "to the boundary line of Hudson's Bay," and that that Province was to include "all the territory to the southward and westward of the said line, to the utmost extent of the country commonly called or known by the name of Canada."

Of course I do not suppose your Lordships would be influenced one way or another by these opinions. I cite them merely for the purpose of shewing that there has been no consensus of judicial opinion in Canada on this point. Some of the judges have taken one view and some another view, and I submit, as far as any judicial authority is concerned, that the authority of Chief Justice Sewell's

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nounce the extent of Upper Canada, but did deem it respectful to pause, when a deliberate act of the King in Council, contemplated and referred to by Parliament, was set at nought by a Provincial Magistrate.

The Earl of Selkirk alluded to legal opinions of the first authority on the jurisdiction of the officers of the Hudson's Bay Company over offences and offenders within its territory. The Chief Justice of Upper Canada has been taught to consider the Parliament of the United Kingdom to be the highest legal authority, and its Act, 43rd of the King, gives jurisdiction over offences committed in the territory of Hudson's Bay to the courts of Lower Canada as occasion may require. * * *

I have the honor to be, etc.,

His Excellency Sir Peregrine Maitland. WILLIAM DUMMER POWELL.

judgment in the Reinhard case is entirely done away with by a reference to the words of the Act, and to the words of treaty upon which the Act was passed, and that the Mississippi, as far as it goes, must be taken to be the line which fixes the western boundary of the Province of Upper Canada.

Well, my Lords, I think that that would be enough to support the award. If it is presumed, and it was presumed that the rise of the Mississippi was considerably north of the point at which it actually does take its rise—considerably north, that is, of the Turtle and Itasca lakes, and considerably north also of the Lake of the Woods—that would carry us, as far as the first natural boundary at all events is concerned, to the English River, which is the boundary given by the award.

The LORD CHANCELLOR.—At present the only evidence as to that boundary —the northern boundary of the award—which we have heard is Mitchell's map.

Mr. SCOBLE.—There is other evidence, my Lord. There is a despatch of Lord Shelburne to Lieutenant-Governor Carleton of Quebec, in the supplementary appendix of the Province of Ontario, printed at page 1, dated on the 14th November, 1767: "Instructions of the Imperial Government as to explorations of the territories to the westward of Lake Superior, and of certain northern territories, as distinguished from the territories comprised in the Hudson's Bay Company's charter," which I think is of importance on this view of the western boundary. The last paragraph is:

"As an accurate knowledge of the interior parts of North America would contribute much towards enabling his Majesty's ministers to judge soundly of the true interests of the different provinces, I cannot too strongly recommend to you the encouraging such adventurers as are willing to explore those parts which have not hitherto been much frequented, and consequently are scarcely, if at all, known, particularly towards the territories comprised in the charter [of the Hudson's Bay Company north*] of the Hudson's Bay Company, northward, and the country beyond the Lake Superior, westward."

The LORD CHANCELLOR.—What is the meaning of that?

Mr. SCOBLE.—I do not know whether it is a misprint or not.

The LORD CHANCELLOR.—"North of the Hudson's Bay Company"—it cannot mean that.

Mr. SCOBLE.—I cannot understand it. If it is correctly printed, I cannot understand what it means—

—"the territories comprised in the charter of the Hudson's Bay Company north of the Hudson's Bay Company, northward,"—

The LORD CHANCELLOR.—What do you refer to the passage for?

Mr. SCOBLE.—I refer to it to shew that as far as the English authorities were concerned it was *terra incognita*, though certainly not so far as the French were concerned. Then the words to which I particularly refer are, "and the country beyond the Lake Superior, westward." Now, my Lord, that country "beyond the Lake Superior, westward," would certainly not be included within the territory granted to the Hudson's Bay Company by charter. It was in the contemplation of the government at that time, four years after the treaty, that there was territory beyond Lake Superior, westwards, which passed to England under that treaty, and which was not included within the territory of the Hudson's Bay Company.

The LORD CHANCELLOR.—How does that appear from the context? It may

*The words which we have put within brackets are in the copy furnished by the Public Record Office, but are manifestly inserted in error, probably in copying into the Register Book. It would seem to be a case of inadvertent repetition, and that the true reading is: "particularly towards the territories comprised in the charter of the Hudson's Bay Company, northward, and the country beyond the Lake Superior, westward."—*Public Record Office—Colonial Correspondence, Canada (Quebec), 1767, No. 4.*

be so, but at present I cannot see how that is borne out—"north of the Hudson's Bay Company."

Mr. SCOBLE.—Simply on these grounds, my Lord, that the government did not know much about the country, and wished to have it examined.

The LORD CHANCELLOR.—There is nothing at all to shew that it was not comprised in the charter of the Hudson's Bay Company?

Mr. SCOBLE.—They draw a distinction, your Lordships see, between that country and the country which belonged to the Hudson's Bay Company.

The LORD PRESIDENT.—Yes, it says "*and* the country beyond the Lake Superior, westward."

The LORD CHANCELLOR.—If the words had been, "particularly towards the territories comprised in the Hudson's Bay Company's charter, and the country beyond the Lake Superior, westward," you would be well-founded in saying that the distinction was drawn, but there come in these words so difficult to understand, which look as if not all the territories in the Hudson's Bay Company's charter were intended to be described?

Mr. SCOBLE.—I would submit that there is a clear distinction drawn here between the Hudson's Bay Company's territory and the country beyond Lake Superior, westward.

The LORD CHANCELLOR.—That is what I at present do not see. I should see it if the words "north of the Hudson's Bay Company, northward" were not there, but there seems to be some error either in the original letter or the print of it, but I should infer that Lord Shelburne pointed to some particular districts, whether all comprehended, or not all comprehended, in the charter of the Hudson's Bay Company—one of those districts being to the north, and certainly so comprised, and the other being westward, which might or might not be so.

Mr. SCOBLE.—Well, my Lord, I am content to take it on that ground It was a matter of enquiry whether the country was or was not comprised in the territory of the Hudson's Bay Company. There appears to have been some action taken upon this.

The LORD CHANCELLOR.—It seems to me at present to be neutral in that respect. It merely shews that the country beyond Lake Superior was one not sufficiently explored.

Mr. SCOBLE.—Then I would ask your Lordships to consider what evidence there is as to this country which passed to the Crown under the Treaty of Paris, which gave to the English king all the French possessions in Canada. Canada at that time was known by the name of Canada, and sometimes by the name of "La Nouvelle France."

The LORD CHANCELLOR.—Were those convertible terms?

Mr. SCOBLE.—Yes, Canada and La Nouvelle France. I think in all the maps you will find it is called "Canada, ou La Nouvelle France."

The LORD CHANCELLOR.—There was a document yesterday, I think, in which there seemed to be a distinction drawn between them.

Lord ABERDARE.—I suppose the northern limits of Louisiana were very little known?

Mr. SCOBLE.—I apprehend very little known. The way in which the boundary is defined in the only book that I have come to on the subject is the very vague description "bounded on the north by Canada."

Sir ROBERT COLLIER.—What was bounded on the north?

Mr. SCOBLE.—Louisiana. I will find your Lordship the reference in a moment.

Lord ABERDARE.—Its importance is this, that it might be shewn that that which is French was Louisiana, but not Canada. It might be French. It might be shewn Louisiana extended in a north-west direction.

Mr. SCOBLE.—I do not think that can be contended at all. I think that what is historically true is, that whatever the boundary between Louisiana and Canada was, whatever was north of that boundary went to England under the Treaty of Paris; whatever was south of that line remained to France under the name of Louisiana.

The LORD PRESIDENT.—There is a partial boundary line on this map.

Mr. SCOBLE.—There is. This description of Louisiana, to which I promised to refer, is at page 47 of the Ontario Appendix. Thomas Jefferys, who is described as "Geograghor to His Majesty," in a book published in 1761, "History of the French Dominions in North and South America," gives the boundaries in this way:

"The Province of Louisiana, or the southern part of New France, extends, according to the French geographers, from the Gulf of Mexico, in about 29 degrees, to near 45 degrees of north latitude, on the western side, and to near 39 degrees on the eastern. . . It is bounded on the north by Canada."

The LORD CHANCELLOR.—That at once proves you were too hasty in saying that New France was equivalent to Canada.

Mr. SCOBLE.—You will find that in another book, published in the year 1671, which is quoted at page 46:* "Canada, as it is taken for one and the same Province with New France, contains New France properly so called." I have seen that "Canada ou La Nouvelle France" occurs constantly in the old French maps.

But with regard to this limit of Louisiana, your Lordship will see, at page 45, Vaisette, another geographer, whose book was published in 1755,† after giving the degrees of latitude and longtitude, goes on to say that it "is bounded on the north by Canada."‡

The LORD CHANCELLOR.—What was Acadia?

Mr. SCOBLE.—Acadia is now Nova Scotia.

The LORD CHANCELLOR.—It has been since we had it. It was not called Nova Scotia by the French. Was not it a part of New France at the time it was a French possession?

Mr. SCOBLE.—That I would not undertake to say. My impression is it was not, but I should be sorry to express any positive opinion on the subject. I think you will find in the old geographers a distinction taken between Acadia and Canada.

* America, being an accurate description of the New World—with maps and sculptures. By John Ogilby, Esquire. London, 1671.

† *Geographic historique, etc.*, par Dom Joseph Vaisette. Paris, 1755. Vol. IV., pp. 296, 302.

‡ The Louisiana of the French, as officially set out in the charter to Crozat, comprised the Mississippi (as far north as the country of the Illinois), with its tributary streams, on either side, to their sources, including the Missouri. Its northern boundary, to the west of the Mississippi, would thus be along the head waters of the northerly and easterly tributaries of the Missouri, from the Rocky Mountains to the Mississippi; and this agrees with the old maps. The countries of the Upper Missouri, however, from the great bend, and of the Yellowstone, having been first discovered, explored and taken possession of by Canadian officers, under commission of the Governor of Canada, proceeding from their establishments on the Assiniboine, may be looked upon as having, after that date, belonged perhaps more properly to Canada than to Louisiana. The Ohio was left to Canada, and the Country of the Illinois—extending from the Illinois River to the Wabache—was within the jurisdiction at times of Canada and at times of Louisiana: at the date of the capitulation it was attached to the latter, and had been for some time. The portion of Louisiana east of the Mississippi was ceded to Great Britain under the Treaty of 1763; but its territory was at the same time augmented by the incorporation with it of such portion of Canada as lay to the west of that river. Subject to the above observation in regard to the countries of the Upper Missouri, the northern boundary of Louisiana became, thus, either (1) the parallel of the source of the Mississippi, from Lake Itasca to the Rocky Mountains, or (2) the height of land dividing the waters that fall into the Mississippi and the Missouri from those that fall into Lake Winnipeg. The line of the 49th parallel, afterwards agreed upon by the Commissioners of Great Britain and the United States, as the limit between the respective possessions of the two countries in that quarter, on the erroneous supposition that it had been settled as the limit between Great Britain and France under the 10th article of the Treaty of Utrecht, was without valid historical or other authority as a boundary of Louisiana. (Joint App. 603, 644, 651, 714; Ontario App. 17, 18, 19; also 103-4, 106-7 (De l'Isle's maps) and 109 (Bowen's maps.)

The LORD CHANCELLOR.—That there is no doubt of, but my impression was and still is that New France was a general name for all the French possessions.

Lord ABERDARE.—This map is an old French map, and you find it there—"Canada ou la Nouvelle France."

Mr. SCOBLE.—There appears to have been a good deal of looseness of description about this country in the 17th century. For instance, Ogilby on the boundaries of Canada, etc., already quoted, in describing Canada and New France, says:

"Canada as it is taken for one and the same province with New France, contains New France, properly so called, Nova Scotia, Norumbega and some adjoining islands."

There is a considerable variety of description, but I think that I am right in saying that as a general rule "Canada ou la Nouvelle France" is the term used by French geographers.

The LORD CHANCELLOR.—On the other hand, in this book of Jefferys to which we have been referred, Louisiana is included as a province.

Mr. SCOBLE.—Yes, that is so.

The LORD CHANCELLOR.—I think probably the largest signification of "La Nouvelle France" included all the French possessions in North America, and it became more commonly used for Canada.

Mr. SCOBLE.—This same geographer, Jefferys, in another book,* in a passage which is quoted in a report of the Canadian Minister of Crown Lands, page 183 of the Joint Appendix, says, at line 21:

"Canada, according to the English account, is bounded on the north by the high lands which separate it from the country about Hudson's Bay, Labrador or New Britain, and the country of the Eskimeaux and the Christeneaux; on the east by the River St. Lawrence; and on the south by the Outawais River, the country of the Six Nations, and Louisiana; its limits towards the west extending over countries and nations hitherto undiscovered."

I am quoting from the memorandum of the Commissioner of Crown Lands. I have not the book itself.

The LORD CHANCELLOR.—It is an extract?

Mr. SCOBLE.—It is an extract from the book published in 1760 or 1761, two or three years before the Treaty of Paris.

The LORD CHANCELLOR.—That is quite indefinite—"over countries and nations hitherto undiscovered."

Mr. SCOBLE.—Yes, very indefinite.

Lord ABERDARE.—Its limits are unlimited.

Mr. SCOBLE.—Then he says, at line 29, describing the country from Lake Superior westward:

"At the mouth of Les Trois Rivières, or the Three Rivers, is a little French fort called Camenistagouia; and twenty-five leagues to the west of the said fort, the land begins to slope and the river to run towards the west."

Lord ABERDARE.—This Fort Camenistagouia is what we call Fort William, probably?

Mr. SCOBLE.—Yes. One gets embarrassed with these double names.

Lord ABERDARE.—That is pretty well admitted now to be within the watershed, and to be in a certain sense a portion of the territory of Ontario.

Mr. MCCARTHY.—Subject to the question of the due north line.

Mr. SCOBLE:

"At ninety-five leagues from this greatest height lies the second establishment of the French that way, called Fort St. Pierre, in the Lake des Pluies. The third is Fort

* A description of New France; or the French Dominions in North America. By T. Jefferys, Geographer to His Majesty. 1761.

St. Charles, eighty leagues further, on the Lake des Bois. The fourth is Fort Maurepas, a hundred leagues distant from the last, near the head of the Lake of Ouinipigon "—I suppose we must take that to be Lake Winnipeg—" Fort La Reine, which is the fifth, lies a hundred leagues further, on the River of the Assiniboëls."

The LORD CHANCELLOR.—I think all these were the seven forts which are mentioned as the " Post of the West Sea " in one place.*

Mr. SCOBLE.—Yes, I think they may be taken to be the same :

" Another fort had been built on the River Rouge, but was deserted on account of its vicinity to the two last. The sixth, Fort Dauphin, stands on the west side of Lac des Prairies, or of the Meadows ; and the seventh, which is called Fort Bourbon, stands on the shore of the great Lake Bourbon. The chain ends with Fort Poskoyac, at the bottom of a river of that name, which falls into Lake Bourbon. The River Poskoyac is made by De Lisle and Buache to rise within twenty-five leagues of their West Sea, which they say communicates with the Pacific Ocean. All these forts are under the Governor of Canada."

Lord ABERDARE.—Lake Bourbon I suppose was the French name for Lake Winnipeg ?

Mr. SCOBLE.—The map gives it as one of the names for Lake Winnipeg. The Lake of the Meadows, or Prairies, is the lake I understand which is now known as Lake Manitoba.

Lord ABERDARE.—The Meadows Lake is the upper portion of Lake Manitoba on this map, near Fort Dauphin, and Swan's Lake is the lower part.

The LORD CHANCELLOR.—It is clear one of the lakes was Lake Bourbon.

Mr. SCOBLE.—Now, my Lord, this book I suppose may be taken as shewing the popular knowledge, or, in fact, I may say shewing the scientific knowledge of the geography of this part of the world possessed in England at the time of the affairs of 1761, two or three years before the Treaty of Paris ; and the British government, I think, may be taken to have known of the existence of these forts, and that they were, as the writer says, under the Governor of Canada, that is under the French government. Now, my Lord, in connection with that, I would ask to refer your Lordships to a passage in Governor Pownall's report.

Sir ROBERT COLLIER.—The Commissioner of Crown Lands goes on to say : " The above, it will be observed, is the English account of what was still French Canada, in 1760."

Mr. SCOBLE.—That was the argument of the Commissioner of Crown Lands, but I do not ask your Lordships to consider that. I only ask your Lordships to consider the authority which is cited. Then I would ask, in connection with that, your Lordships' attention to a part of Governor Pownall's report, in 1756.† The report is at page 601 of the Joint Appendix.

Sir MONTAGUE SMITH.—What is the date ?

Mr. SCOBLE.—1756. I am very sorry to have to refer your Lordships in this way from book to book, but I am afraid it is inevitable. Now, the report begins at page 601, and is described as " Extracts from Governor Pownall's official account of the French posts and the French dominion in North America, 1756." It appears to have been drawn up by order of, and presented to, his Royal Highness the Duke of Cumberland.

Sir MONTAGUE SMITH.—It has been referred to.

The LORD CHANCELLOR.—I do not know whether the title is in any way part of the document—is it ? Whoever drew up the title seems to have distinguished between French posts and French dominions.

Mr. SCOBLE.—The term used is French *dominion*, my Lord. I have not seen the book, and cannot give your Lordship any definite information about it, but the

* *Ante*, p. 94, note. † Quoted *ante*, pp. 85-8.

original title apparently would be that at foot of the page. It is "A Memorial stating the nature of the service in North America, and proposing a general plan of operations as founded thereon, drawn up by order of and presented to his Royal Highness the Duke of Cumberland, 1756." The Duke of Cumberland was commander-in-chief in 1756, and I suppose this was in regard to military action. My friend read extracts, and gave your Lordships a great deal of information with regard to the forts in Canada which are specified at page 603, and I would only further call your Lordships' attention to the Illinois forts, with the force assigned to them, which are mentioned there later on:

"The Illinois	six companies	300
"The Posts were, in 1752	Caskaskias. Fort de Chartres. Village de St. Philip. Prairie de Rocher. Cahokias. Village de Ste. Genevieve."	

Those were all posts in the Illinois country, which was ceded by the Treaty of Paris, and some of them I have already mentioned would be excluded from the operation of the Quebec Act by the due north line which was claimed by my learned friends. But your Lordships will find, a little further on:

"As to the posts in the Illinois country, I am not able to describe them particularly; but what appears to be of more consequence, I collect from Mr. Vaudreuil's letters (from 1743 to 1752) the general idea upon which the fortifying and securing that country is founded."

Then he gives the history of the forts; and at page 604, line 9, I think there is a very important paragraph. He says:

"Thus the French do not only *settle* the country *but also take possession of it*, and by the form, site and police of such possessions, (led on and established by the guidance of, and in alliance with the waters), a natural foundation of a one command, have they acquired and become possessed of *the command of this country.*

"By these means, I repeat it, have they created an alliance, an interest, with all the Indians on the continent; by these means have they acquired an influence, a command throughout the country."

Lord ABERDARE.—That may be a moral command.

Mr. SCOBLE.—Yes.

The LORD CHANCELLOR.—It means a predominant influence, a practical power, which undoubtedly may lead to possession.

Sir ROBERT COLLIER.—"*An ascendancy,*" he goes on to say, with the Indians.

The LORD CHANCELLOR.—Yes, the words which follow are certainly important:

"They know too well the spirit of Indian politics to affect a superiority, a government, over the Indians, yet they have in reality, and truth of more solid effect, an influence, *an ascendancy*, in all the councils of all the Indians on the continent"—

Mr. SCOBLE:

—"and lead and direct their measures, not even our own allies, the Five Nations, excepted."

The LORD CHANCELLOR.—It is obvious he distinguishes that from territorial possession.

Sir MONTAGUE SMITH.—There is a classification of the different tribes of Indians, and how they are affected?

Mr. SCOBLE.—Yes.

The LORD CHANCELLOR.—I see a number of tribes bracketed and marked "Supposed to be in the British interest," and there are some "Wholly in the British interest," and so on.

Mr. SCOBLE.—I think these passages which I have read are the most important passages, as shewing the condition of English knowledge at the time, or immediately before the time, of the treaty. There are other reports, a little subsequent to the treaty, which do not add very much to the information which is contained in Jefferys and in Governor Pownall, as for instance a report by Governor Carleton at page 609, as to the French posts of the interior, 1768.*

The LORD CHANCELLOR.—That was read.

Mr. SCOBLE.—That was read. Now, my Lord, the French view of what they had, and what they ceded, was very much more in favour of actual possession than the English view contained in the documents which I have read. In fact the whole contention of the French, from the time the French and British interests come into conflict in this part of the world, appears to have been that they were in possession of the country, not only by right of prior discovery, but also by occupation and settlement.

Lord ABERDARE.—This contention goes to shew the original Province of Manitoba was wrongly constituted.

Mr. SCOBLE.—Well, my Lord, if it were necessary to contend that, no doubt that might be contended upon these facts.

At page 619, there is a report of the Sieur de St. Lusson, who was subdelegate of the Intendant Talon, in 1671,† in which he gives an account of the way in which he proceeded. He says :

* Extracts printed *ante*, pp. 82-4.

† RECORD OF THE TAKING POSSESSION, IN THE KING'S NAME, OF THE COUNTRIES OF THE WEST AND NORTH, BY THE SIEUR DE ST. LUSSON, SUB-DELEGATE OF THE INTENDANT TALON, 1671.

SIMON FRANCOIS DAUMONT, Esquire, Sieur de St. Lusson, Commissioner Subdelegate of my Lord the Intendant of New France, to search for the copper mines in the countries of the Outaoüais, Nespercez, Illinois, and other Indian nations, discovered and to be discovered, in North America, near Lake Superior, or the Fresh Sea.

On the orders by us received, on the third of September last, from my Lord the Intendant of New France, signed and paraphéd TALON, and underneath by my Lord VARNIER, with paraph., to proceed forthwith to the countries of the Outaoüais, Nespercez, Illinois, and other nations discovered and to be discovered, in North America, near Lake Superior, or the Fresh Sea, to make search and discovery there for all sorts of mines, particularly that of copper : commanding us moreover to take possession, in the King's name, of all the country, inhabited and uninhabited, wherever we should pass, planting in the first village at which we land the cross, in order to produce there the fruits of Christianity, and the escutcheon (*écu*) of France, to confirm His Majesty's authority and the French dominion over it.

We having made, in virtue of our commission, our first landing at the village or hamlet of St. Mary of the Falls, the place where the Reverend Jesuit Fathers are making their mission, and the Indian nations called Chepoës, Malamechs. Noquets and others do actually reside ; we caused the greatest portion possible of the other neighbouring tribes to be assembled there, who attended to the number of fourteen nations :

To wit : the Etchipoës, the Malamechs and the Noquets, inhabiting the said place of St. Mary of the Sault ; and the Banabeoüiks and Makamiteks ; the Poulxteattemis, Ounabonims, Sassassaoua Cottons, inhabiting the bay called *des Puants*, and who have undertaken to make it known to their neighbours, who are the Illinois, Mascoutins, Outtougamis and other tribes ; the Christinos, Assinipoals, Aumonssonniks, Outaoüais, Bouscouttons, Niscaks and Masquikoukioeks, all inhabitants of the northern country and near neighbours of the sea, who undertook to tell and communicate it to their neighbours, who are very numerous, inhabiting even the sea coast ; To whom, in the presence of the Reverend Fathers of the Company of Jesus and of all the French hereafter mentioned, we have caused to be read our said commission, and had interpreted in their language by Sieur Nicolas Perrot, His Majesty's interpreter in that part, so that they may not be ignorant of it ; afterwards causing a cross to be prepared in order that the fruits of Christianity be produced there, and near it a cedar pole to which we have affixed the arms of France, saying three times in a loud voice and with public outcry, that IN THE NAME OF THE MOST HIGH, MOST MIGHTY AND MOST REDOUBTABLE MONARCH, LOUIS, the XIVTH. OF THE CHRISTIAN NAME, KING OF FRANCE AND NAVARRE, we take possession of the said place of St. Mary of the Falls, as well as of Lakes Huron and Superior, the Island of Caientolon, and of other countries, rivers, lakes and tributaries, contiguous and adjacent thereunto, as well discovered as to be discovered, which are bounded on the one side by the Northern and Western Seas, and on the other side by the South Sea, including all its length or breadth ; raising at each of the said three times a sod of earth, whilst crying *Vive le Roi*, and making the whole of the assembly, as well French as Indians, repeat the same ; declaring to the aforesaid nations that henceforward as from this moment they were dependent on His Majesty, subject to be controlled by his laws, and to follow his customs, promising them all protection and succour on his part against the incursion or invasion of their

"On the orders by us received on the third of September last, from my lord the Intendant of New France, signed and paraphéd TALON, and underneath by my lord VARNIER, with paraph., to proceed forthwith to the countries of the Outaoüais, Nespercez, Illinois, and other nations, discovered and to be discovered, in North America, near Lake Superior or the Fresh Sea, to make search and discovery there for all sorts of mines, particularly that of copper, commanding us moreover to take possession in the King's name, of all the country inhabited and uninhabited wherever we should pass, planting in the first village at which we land, the cross, in order to produce there the fruits of Christianity, and the escutcheon of France, to confirm His Majesty's authority and the French dominion over it."

He goes on to say that he has caused a number of tribes to assemble, to the number of fourteen nations, and he gives their names:

"To whom, in the presence of the Reverend Fathers of the Company of Jesus, and of all the French hereafter mentioned, we have caused to be read our said commission, and had it interpreted in their language by Sieur Nicolas Perrot, His Majesty's interpreter in that part, so that they may not be ignorant of it afterwards, causing a cross to be prepared in order that the fruits of Christianity be produced there, and near it a cedar pole to which we have affixed the arms of France, saying three times in a loud voice and with public outcry, that in the name of the Most High, Most Mighty and Most Redoubtable Monarch, Louis the XIVth."

The LORD CHANCELLOR.—They took possession of the whole continent.

Mr. SCOBLE.—Yes.

Lord ABERDARE.—Discovered or to be discovered.

Mr. SCOBLE.—Yes. They acted in much the same way as every nation acted in those days. They afterwards occasioned disputes and came to wars in order to maintain their right to territories they had in an exceedingly free and easy manner taken possession of; and to a certain extent, according to international law as it was then understood, they were perfectly right in doing so. But here they profess to take possession of the whole of the continent:

—"as well discovered as to be discovered, which are bounded on the one side by the Northern and Western Seas, and on the other side by the South Sea, including all its length or breadth."

Then at page 621, there is another record of taking possession, in the King's name, of the countries of the Upper Mississippi:* "Nicolas Perrot, commanding

enemies, declaring unto all other Potentates, Princes and Sovereigns, States and Republics, to them and their subjects, that they cannot or ought not seize on, or settle in, any places in said country, except with the good pleasure of his said Most Christian Majesty and of him who will govern the country in his behalf, on pain of incurring his hatred and the effects of his arms; and in order that no one plead cause of ignorance, we have attached to the back of the Arms of France thus much of the present, our minute of the taking possession, Signed by us and the undernamed persons, who were all present:

Done at St. Mary of the Falls, on the 14th June, in the year of Grace 1671, in the presence of the Reverend Fathers: the Reverend Father Claude Dablon, Superior of the missions in this country; the Rev. Father Gabriel Drouillets, the Rev. Father Claude Allouëz, the Rev. Father André, all of the Company of Jesus; and of Sieur Nas. Perrot, His Majesty's interpreter in these parts; Sieur Jolliet; Jques. Mogras, an inhabitant of Three Rivers; Pierre Moreau dt. de la Touppine, a soldier belonging to the garrison of the Castle of Quebec; Denis Masse, Fçois. de Chavigny, Sr. de la Chevriottière, Jques. Lagillier, Jeanne Mayseré, Nas. Dupuis, Fçois. Bidaud, Jques. Joniel, Prre. Portcet, Robert Duprat, Vital Oriol, Guillaume.

* RECORD OF THE TAKING POSSESSION, IN THE KING'S NAME, OF THE COUNTRIES OF THE UPPER MISSISSIPPI, 1689.

CANADA,

BAY DES PUANTS.

Record of the taking possession, in His Majesty's name, of the Bay des Puants,[1] of the lake and rivers of the Outagamis,[2] and Maskoutinas,[3] of the River Ouiskonche,[4] and that of the Missiscipi, the country of the Nadouëssioux,[5] the rivers St. Croix and St. Peter, and other places more remote, 8th May, 1689.

Nicolas Perrot, commanding for the King at the Post of the Nadouëssioux, commisioned by the Marquis de Denonville, Governor and Lieutenant-General of all New France, to manage the interest of commerce

[1]Green Bay. [2]Fox River. [3]Lake Winnebago. [4]Wisconsin. [5]Sioux.

for the King at the Post of the Nadouesioux, commissioned by the Marquis de Denonville, Governor and Lieutenant-General of all New France," takes "possession of all the places where he has hitherto been and whither he will go." Then he describes the places he has been to, and records that he has taken possession, "for and in the name of the King, of the countries and rivers inhabited by the said tribes, and of which they are proprietors." Then in regard to these matters of taking possession, I may call your Lordships attention to page 623, line 20, where the pretension to Hudson's Bay is set up in a letter from Louis XIV. himself to M. de la Barre. It is dated Fontainebleau, 5th August, 1683:

"I recommend you to prevent the English as much as possible from establishing themselves in Hudson's Bay, possession whereof was taken in my name several years ago."

Lord ABERDARE.—That was in the evil days of Charles II.

Mr. SCOBLE.—Yes. Then again, at page 624, writing again to M. de la Barre, on the 10th of April, 1684, as to the affairs of the Nelson River, he says, at line 11:

"As I think it important, nevertheless, to prevent the English from establishing themselves on that river, it would be well for you to have a proposal made to the commandant at Hudson's Bay that neither the French nor the English should have power to make any new establishments, to which I am persuaded he will give his consent the more readily as he is not in a position to prevent those which my subjects would wish to form in the said Nelson's River."

And then, in regard to that same Nelson River, at page 625, on an application for a grant of the Nelson River, by Gaultier de Comporté, in 1684, it is recited that this

"Gaultier de Comporté, Prêvoté of Canada, has heretofore presented a memoir, by which he requests the grant, unto himself and his associates, of the ownership of the River de Bourbon—de Nelson—in Hudson's Bay, of which possession had been taken in the name of the King, for as long a time as it should please, with permission to establish three posts in the river which descends into the said bay, at seventy leagues from the place where the farmers are settled."

Then, in a report made in 1685 by the Governor of Montreal,* to the Marquis de Seignelay, the origin of the French claim by settlement is stated to be:

"As regards Hudson's Bay, the French settled there in 1656, by virtue of an *arret* of the Sovereign Council of Quebec, authorizing Sieur Bourdon, its Attorney-General, to make the discovery thereof, who went to the north of said bay, and took possession thereof in His Majesty's name."

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among all the Indian tribes and peoples of the Bay des Puants, Nadouesioux, Mascoutins, and other western nations of the Upper Mississippi, and to take possession, in the King's name, of all the places where he has hitherto been, and whither he will go.

We, this day, the eighth of May, one thousand six hundred and eighty-nine, do, in presence of the Reverend Father Marest, of the Society of Jesus, missionary among the Nadouesioux; of Mons. de Borie-Guillot, commanding the French in the neighbourhood of Ouiskonche, on the Mississipi; Augustin Legardeur, Esquire, Sieur de Caumont, and of Messieurs Le Sueur, Hébert, Lemire, and Blein, declare to all whom it may concern, that having come from the Bay des Puants, and to the lake of the Ouiskonches, and to the river Mississipi, we did transport ourselves to the country of the Nadouesioux, on the border of the River Saint Croix, and at the mouth of the River Saint Peter, on the bank of which were the Mantantans, and farther up into the interior to the north-east of the Mississipi as far as the Menchokatoux, with whom dwell the majority of the Songestikons and other Nadouesioux, who are to the north-east of the Mississippi, to take possession for and in the name of the King, of the countries and rivers inhabited by the said tribes, and of which they are proprietors.

The present Act, done in our presence, signed with our hand, and subscribed by the Reverend Father Marest, Messrs. de Borie-Guillot and Caumont, and the Sieurs Le Sueur, Hébert, Lemire, and Blein.

Done at the Post St. Anthony, the day and year aforesaid. These presents are in duplicate. Signed to the original: Joseph Jean Marest, of the Society of Jesus, N. Pérot, Legardeur de Caumont, Le Sueur Jean Hébert, Joseph Lemire, and F. Blein.

* The Sieur de Callières, afterwards, on the death of Frontenac, Governor of Canada. (Joint App. 625).

The Attorney-General was a very active person in those days; and in these latter days I have read of an Attorney-General leading a force in the south of Africa for the purpose of repressing attacks by the hostile tribes in that part of the world—the Attorney-General of the Cape of Good Hope led a force most gallantly the other day, and I believe came off victorious in his encounters.

I think, my Lord, all these documents, and others with which the Appendix abounds, shew tolerably clearly that before the time of the Treaty of Paris the King of France laid claim, according to the fashion of those times, to the whole of the country to the west and south which constituted Canada as distinguished from Louisiana. I think it was so understood by the British Government, at the time of the treaty and subsequently, because there is a rather curious thing in the parliamentary debates of the year following the year in which the Quebec Act was passed. No less a person than Lord Camden brought a bill into the House of Lords for the repeal of the Quebec Act,* and his objection to the Act was put on three grounds. The first ground was the extension of the limits of Canada; the other two grounds were the grounds upon which the bill had been fought in both houses in the previous year, namely: first, they objected to the establishment of popery in this large region, and in the second place, they objected to the establishment of a much more arbitrary government than that which prevailed in the other North American colonies. On the point of the first objection Lord Camden observed:

"There could be no good reason for so extending the limits of Quebec as to make them comprehend a vast extent of country two thousand miles in length from north to south, and bounded on the west only by the South Sea."

The Lord Chancellor.—A distinguished person speaking in the House of Lords upon an idea which, without proof, is not to be accepted upon his authority. Do you suppose Lord Camden knew more about it than we do?

*Debate in the House of Lords, on a proposal to repeal the Quebec Act of 1774.

(*Parliamentary Register, Vol. 2, 1775, pp. 134, 135, 138, 139, 148, 149*).

17th May, 1775.

Lord Camden.—His Lordship arranged his objections to the Act under the three following heads:—

1st. The extension of the limits of Quebec.
2nd. The establishment, etc.
3rd. The civil despotism, etc.

Under the first of these heads [the extension of the limits of Quebec] his Lordship proved, that there could be no good reason for so extending the limits of Quebec, as to make them comprehend a vast extent of country two thousand miles in length from north to south, and bounded on the west only by the South Sea. That this enlargement could only be intended to extend the shackles of arbitrary power, and of popery, over all the future settlements and colonies of America. That by drawing the limits of that province close along the interior settlements of all the old English colonies, so as to prevent their further progress, an eternal barrier was intended to be placed, like the Chinese wall, against the further extension of civil liberty and the Protestant religion. His Lordship then animadverted particularly on the instructions lately transmitted to General Carleton, whereby the regulation of all the Indian trade of North America is put into the hands of the Governor and Council of Quebec, and the other colonies are obliged, in their intercourse with the Indians, to submit to the laws, not of the British parliament, but of a despotic, unconstitutional legislature in Canada; a measure calculated to produce endless contentions and animosities. * * * * His Lordship concluded by offering the following bill: A bill to repeal an Act made in the last session of the last Parliament, intituled *An Act for making more effectual provision for the government of the Province of Quebeck, in North America.* * * * *

Lord Wycombe [Earl Shelburne].—The peltry or skin trade, my Lords, is a matter which I presume to affirm is of the utmost magnitude, and of the last importance to the trade and commerce of the colonies and this country. The arrangement and regulation of this business has, give me leave to say, cost His Majesty's ministers more time and trouble than any one matter I know of. The noble Earl behind me [Earl of Hillsborough], it is true, differed from me among other of His Majesty's servants on the regulating the trade with the Indians; but it was never so much as dreamed of that the whole skin trade, from Hudson's Bay to the Forks of the Mississippi, should be at once taken from the several American colonies and transferred to the French Canadians; or, which is substantially the same thing, that by a royal instruction the sole direction of it should be vested in the Governor of Quebec. For I will be bold to contend that whatever colourable construction may be put upon it, it will operate as a complete exclusion and total monopoly so far as the Protestant British colonies can possibly be interested.

Mr. SCOBLE.—I do not suppose he knew as much, or at all events did not know as much as your Lordships will know when you come to the end of this case; but it shews that according to the means of knowledge he possessed at that time, and according to his construction of the Quebec Act, the Province of Quebec was made to include all the territory France purported to cede, and England assumed to take.

The LORD CHANCELLOR.—What are the words in the Quebec Act? It is an Act containing the boundaries. What are the bounds which shew it extends to the Pacific? You do not make much progress by shewing what Lord Camden said.

Lord ABERDARE.—You seem in this argument to throw away all the instructions given to Governor Carleton and others to define these boundaries. You are going far beyond that found by the award.

Mr. SCOBLE.—I think Governor Carleton went far beyond that.

Sir ROBERT COLLIER.—If he went as far as that, it is quite enough for you.

The LORD CHANCELLOR.—What strikes me at present is, that the Act speaks for itself, and shews distinctly that whether the point is that for which your opponents contend, or that stated by the award, when you have got to that point you go northward to the southern boundary of the territory granted to the Hudson's Bay Company: and if we accepted your learned leader's suggestion, that means northward to Hudson's Bay, and nothing else. Still you cut off an enormous extent of territory, taking into consideration Lord Camden's view.

Mr. SCOBLE.—If your Lordships construe the word "northward" as referring to territory, and not to boundary, that would give all that Lord Camden seemed to think it did.

The LORD CHANCELLOR.—I do not follow you. This Act states what territories are included, and it gives you, first of all, the line of boundary as far as the junction of the Ohio and the Mississippi. Then you either take north from that point, or from some point arrived at by going northward along the Mississippi, and the further boundary is struck northward until it meets the southern boundary of the Hudson's Bay Company. How can that be? The thing is simply impossible.

Mr. SCOBLE.—The westward boundary does not carry it further than the banks of the Mississippi.

The LORD CHANCELLOR.—And from that you strike northward until you reach either Hudson's Bay, or some territory which is described as granted to "the Merchants Adventurers of England trading to Hudson's Bay."

Mr. SCOBLE.—I submit the Act may be read in this way:

"All the territories, islands and countries in North America belonging to the Crown of Great Britain bounded on the south by a line, etc., and extending northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

The LORD CHANCELLOR.—It is to give a southern boundary, an eastern boundary, a western boundary, and a northern boundary, and how it can include anything which is not within any possible limits so described seems to be beyond the power of imagination to conceive.

Lord ABERDARE.—And it seems wholly unnecessary for what is your substantial contention.

Mr. SCOBLE.—Well then, my Lords, I will leave that part of the case, and in obedience to your Lordships' view just expressed I will address myself now to what is the northern boundary established by the Quebec Act. That is stated to be "the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay." Now no southern boundary of those

territories had at that time, or has to this day, been ascertained. It is a historical error to suppose that any boundary was settled by or after the Treaty of Utrecht. At page 587 of the Joint Appendix, your Lordship will find the memorial of the Hudson's Bay Company, dated the 6th December, 1759, in which, "in prospect of an approaching treaty of peace between this nation and France"—that is in prospect of the Treaty of Paris of 1763—they make certain representations. They state what the French had been doing in Hudson's Bad before the Treaty of Utrecht, they recite articles 10 and 11 of that treaty, any then, at line 22, they go on to say this:

"That in pursuance of the said treaty, and an especial commission of her said late Majesty, Queen Anne, dated the 20th of July, 1713, the said Bay and lands, then in possession of the French, were delivered up to Governor Knight and Kelsey, who took possession thereof for the English Hudson's Bay Company, and Commissaries were appointed to settle the said limits and adjust the damages the company had sustained, which for the ships and goods of the company taken by the French appears by an account stated in the year 1713, and delivered to the then Lords Commissioners of Trade and Plantations, amounted to upwards of £100,000, besides the damages the company sustained by the enemy's burning three of their forts and factories at Charlton Island, Moose River, and New Severn, and proceedings were had by the said Commissaries towards settling the same, but they were never able to bring the settlement of the said limits to a final conclusion, nor did the said Hudson's Bay Company ever receive any satisfaction for their said damages."

It is perfectly clear then that these lines upon the various maps which point out the limits settled by the Treaty of Utrecht, are lines introduced into these maps without any historical foundation at all, because no limits were ever settled from the date of the Treaty of Utrecht, or from the date of the Treaty of Paris, or since. If that is so, your Lordships have now to determine what ought to be considered the southern boundary of the territory granted to the Hudson's Bay Company, at the time of the Treaty of Paris, and of the Quebec Act of 1774. I think the best evidence as to the condition of the Hudson's Bay Company's settlements at the time of the treaty is to be found in a letter from the Right Honourable George G. Goschen, who was chairman of the company at the time the letter was written, which is printed at page 594 of the Joint Appendix. It is dated 12th December, 1876, and addressed by Mr. Goschen, as Chairman of the Hudson's Bay Company, to the Secretary of State for Canada. He encloses, first of all, a map; then, a statement prepared with reference to the Parliamentary enquiry which took place in 1857. Then, in the fourth paragraph of his letter, he says this:

"At the time of the passing of the Quebec Act, 1774, the company had not extended their posts and operations far from the shores of Hudson's Bay. Journals of the following trading stations have been preserved bearing that date, namely, Albany, Henley, Moose, Eastmain, York, Severn, and Churchill. These journals give no information upon the subject of the boundaries between Canada and the territory of the company, nor was the question raised in 1748, when the House of Lords held an enquiry with reference to the company's affairs as at that time conducted. A map, No. 3, no doubt prepared for that occasion, and sent herewith, shews the extent of country to which these operations were then confined."

I do not know whether my learned friends have that map; but that map no doubt would shew the Hudson's Bay Company's views of its settlements at the time of the passing of the Quebec Act.*

Lord ABERDARE.—Yes, it would shew historically what they occupied then. It would not shew what was the limit of their actual claims now.

* This is the Hudson's Bay Company's MS. map of 1748, referred to at p. 109 *ante*.

Mr. SCOBLE.—I apprehend they could not extend their boundaries subsequent to the Quebec Act beyond the limits which those boundaries had at the time of the Quebec Act.

The LORD CHANCELLOR.—The question is, what is meant in the Quebec Act by the "territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

Mr. SCOBLE.—Yes, and that makes it necessary that I should refer, and I shall do it very briefly, to the charter of the Hudson's Bay Company.

The LORD CHANCELLOR.—What is important, as bearing upon that, is the use in that charter of the term "Rupert's Land," as distinguishing territory over which the grant was meant to extend.

Mr. SCOBLE.—The first observation I will make with regard to this charter, which is printed at page 341 of the Joint Appendix,* is that the King, in granting it, does not set up any title to the lands that he is granting by right of prior discovery, but only such title as he might have by occupation and settlement.

The LORD CHANCELLOR.—What are the words which appear to you to indicate that—the words whereby whatever is actually possessed by the King's subjects or the subjects of any other State is excluded?

Mr. SCOBLE.—Yes, and I say that excludes also any claim by right of prior discovery. He purports to grant whatever he has, that is, all the lands, countries and territories.

Lord ABERDARE.—He assumes all to be his.

Mr. SCOBLE.—Then, I apprehend, if he were claiming by right of first discovery, he would claim to have the whole of it.

Lord ABERDARE.—Then surely we come back to what is subsequently admitted to be Rupert's Land?

Mr. SCOBLE.—I do not think anything was subsequently admitted to be Rupert's Land, because in the Rupert's Land Act,† in which the phrase "Rupert's Land" for the first time received legislative sanction, there is an express reservation of all rights in regard to it.

The LORD CHANCELLOR.—There are some words which indicate what is meant—are not there?

Mr. SCOBLE.—I will give your Lordship the exact words. They are at page 445:

"For the purposes of this Act, the term 'Rupert's Land' shall include the whole of the lands and territories held, or claimed to be held, by the said Governor and Company."

The LORD CHANCELLOR.—"Or claimed to be held." You see the whole of the present relations of Canada and Rupert's Land are founded upon this.

Mr. SCOBLE.—But the surrender which was to be made was only of—

"the lands, territories, rights, privileges, liberties, franchises, powers and authorities, so far as the same have been lawfully granted to the said company."

The LORD CHANCELLOR.—Where is that?

Mr. SCOBLE.—In the 3rd paragraph of the preamble, at line 34.

Lord ABERDARE.—But practically, although not admitting, and guarding against, the excessive claims of the Hudson's Bay Company, for the purpose of the annexation of those territories they were admitted.

Sir MONTAGUE SMITH.—They seem to me to be left undefined, but they wished to take a surrender of whatever they had, and whatever they might claim.

Sir BARNES PEACOCK.—The Act speaks of "Rupert's Land and the North-Western Territory," and then it defines what Rupert's Land means.

Mr. SCOBLE.—For the purposes of the Act, and not otherwise.

* Extracts printed *ante*, p. 51.

† Imp. Act, 31 and 32 Vict., cap. 106.

Sir BARNES PEACOCK.—The annexation was to be of Rupert's Land and the North-Western Territory belonging to the Hudson's Bay Company.

Mr. SCOBLE.—The North-Western Territory, so called, was territory entirely external to that granted by charter to the company; they had no claim to it other than that of exclusive trade under, and only for the term of, their license.

The LORD CHANCELLOR.—When you speak of "for the purposes of this Act," the purposes of the Act are, that this territory shall be part of the Dominion of Canada, and the whole of the legislation takes place upon that footing.

Mr. SCOBLE.—Upon the footing of a compromise.

The LORD CHANCELLOR.—No, upon the footing of its being treated by the Imperial Parliament as external to Canada.*

Mr. SCOBLE.—Then, on that presumption we do not get any further as to what Rupert's Land is.

The LORD CHANCELLOR.—As to the actual limit, but that it was a large territory then claimed by the Hudson's Bay Company, and seems to be so, you do get that.

Mr. SCOBLE.—They may have claimed under two rights. They may have claimed under their charter in regard to land immediately in the neighbourhood of their settlements in Hudson's Bay, and they may have claimed under the right derived from long occupation in regard to other portions of that territory.

Sir BARNES PEACOCK.—Is not that what was intended to be annexed to Canada, for which they were to pay £300,000?

Mr. SCOBLE.—It was a compromise arrived at between the Hudson's Bay Company and the Dominion of Canada.

Sir BARNES PEACOCK.—They purchased from the Hudson's Bay Company all those rights, with certain exceptions which were reserved to the Hudson's Bay Company, and they paid £300,000. Then there is a stipulation in the surrender as to the electric telegraph. Canada was to purchase from the Hudson's Bay Company their electric telegraph, and that is in the surrender, and in the Order in Council. Do you know how far that electric telegraph went?

Mr. SCOBLE.—I do not know, my Lord. My friends will supply your Lordship with that information by and bye.

The LORD CHANCELLOR.—Can you point out where the Fort Garry mentioned at page 447 is?

Mr. SCOBLE.—Fort Garry is where the town of Winnipeg now stands.

The LORD CHANCELLOR.—Then that is very important, because you see this Imperial Order in Council, under that Act of Parliament, distinctly treats the town of Winnipeg as adjoining the forts of the Hudson's Bay Company. Then the company, as part of the terms for which they stipulated, besides getting £300,000, were to select certain blocks adjoining each of their forts in the Red River limits; and one of those was a block of 500 acres at the "Upper Fort Garry and town of Winnipeg, including the enclosed park around shop, and ground at the entrance of the town," shewing most distinctly that that was within their grant.*

Sir BARNES PEACOCK.—On another page, there is also a reference to "Upper Fort Garry and the town of Winnipeg."

The LORD CHANCELLOR.—There is no doubt that the Hudson's Bay Company had settlements in this country at the time of the surrender. In construing the words in the Rupert's Land Act, "the whole of the land or territories held, or claimed," it must be taken in connection with the Order in Council. It is quite clear that this was land so held.*

Mr. SCOBLE.—And they might hold that by right of occupation and not under their charter at all.

* See note to the Award, appendix A. hereto.

The LORD CHANCELLOR.—Supposing they did, this Imperial Act is an instrument which treats that territory as external to Canada,* and to be admitted into Canada, if the Crown should think fit, on certain terms.

Sir BARNES PEACOCK.—Canada was to purchase it for £300,000.

Mr. SCOBLE.—That was a compromise.

The LORD CHANCELLOR.—And if it has been ascertained that that was part of Rupert's Land,* how can you say that it is now to be treated as part of Canada? Of course your argument on the award does not require you to say so, but if you are going to claim the whole of North America, north of the United States, you must say so.

Lord ABERDARE.—All this argument seems to me to strengthen your claim for the more limited territory, which is substantially what you are going for.

Sir ROBERT COLLIER.—That does not in the least hurt you, if you confine yourself to the contention which you were confined to sometime ago.

The LORD CHANCELLOR.—You told us yesterday that you meant to limit yourself to that, but I suppose further consideration leads you to take a different view?

Mr. SCOBLE.—It was rather in consequence of something which fell from one of your Lordships, because I was going to address myself to the state of things on the shores of Hudson's Bay at the time the Treaty of Utrecht was passed, and to shew what the Hudson's Bay Company had at that time, and that there was a claim on the part of the French King known to, and to a certain extent admitted by, the English to the land of what is called the bottom of Hudson's Bay.

Lord ABERDARE.—But that is not before us?

Mr. SCOBLE.—It is important, incidentally, in regard to the argument as to the height of land. If it is going to be contended that we are limited by the height of land, then every piece of evidence which shews that we have a right to go to the shore of Hudson's Bay is of importance to our claim; if we are to be bounded by the height of land, we do not get to Hudson's Bay at all.

The LORD CHANCELLOR.—I thought at present we had only to decide the boundaries between Manitoba and Ontario, and nobody contends that Manitoba goes up to Hudson's Bay.

Mr. SCOBLE.—But I understood your Lordship to consider that, to a certain extent, the question of the northern boundary was involved.

The LORD CHANCELLOR.—The northern boundary between Manitoba and Ontario, certainly; but not the northern boundary of Ontario with reference to any place not adjoining Manitoba.

Mr. SCOBLE.—If that is so, of course it is unnecessary to say anything further with regard to that, but I understood that your Lordships, in considering the question of the award, would consider also whether the northern boundary given to Ontario by that award was one which was supported by the evidence.

The LORD CHANCELLOR.—Certainly, but then that is the northern boundary between Ontario and Manitoba.

Sir MONTAGUE SMITH.—Where you leave Manitoba, going eastward, is not referred to us.

Mr. SCOBLE.—Then it is not necessary for me to address myself to that. The point I understand your Lordships are going to determine is, What is the proper boundary between Ontario and Manitoba?

Sir MONTAGUE SMITH.—Yes. Is there anything else referred to us?

Mr. SCOBLE.—They do not adjoin on the north at all.

The LORD CHANCELLOR.—Yes they do. I understand that the whole of that tract [*pointing on the Ontario Boundary map*] coloured with a pale yellowish

* See note to the Award, appendix A. hereto.

tint and orange coloured lines across it—single orange lines, not double—had been given by the Dominion to Manitoba.* Is not that so?

Sir ROBERT COLLIER.—Yes.

The LORD CHANCELLOR.—Then, of course, if the Dominion could give that to Manitoba, and it was not part of Ontario, the boundary there marked by the English River, Lonely Lake, and Lake St. Joseph, is in it. Of course, if it is admitted on both sides beyond all question, then it will save trouble.

Sir ROBERT COLLIER [*to Mr. McCarthy*].—Do you say it is necessary to consider the northern boundary?

Mr. MCCARTHY.—Yes, we say it is necessary to consider it.

Lord ABERDARE [*to Mr. Mowat*].—If you will pardon me, it seems to me you should make up your mind whether you are going to insist on the portion of Manitoba which is north of the tract which was awarded by the arbitrators.

Mr. MOWAT.—We do not claim that.

Mr. SCOBLE.—No, not this cross-barred lattice part—the yellowish lines [*pointing*].

Sir MONTAGUE SMITH.—I understood the Attorney-General of Ontario to limit his argument to what was within the red.

Mr. MOWAT.—Yes. Perhaps, in a word or two I could explain about that piece of boundary as to which an observation has been made just now. By the terms of the Dominion Act extending the limits of Manitoba, its eastern boundary is made to depend upon our western boundary, not merely for the distance between the two provinces, but for a further considerable distance, so that whether Manitoba gets that from the Dominion or not depends on the present question; but we have no concern with it.

Sir ROBERT COLLIER.—You are satisfied with the boundary in the cross-barred lines [*referring to the map*]?

Mr. MOWAT.—Yes.

The LORD PRESIDENT.—With the award line?

Mr. SCOBLE.—Yes.

Lord ABERDARE.—Then your argument may as well be addressed to that?

Mr. SCOBLE.—Quite so: I will not trouble your Lordships with the other. Now, with regard to the territory which lies between the due north line from the conflux of the Ohio and Mississippi, which is shewn on the map here, and the western boundary which the award has given us, in that portion which is north of the height of land, there is not, so far as I am aware, any post of any kind of the Hudson's Bay Company, or of the North-West Company, to be found there. But there *were* some posts within the portion of the territory which the award has given us, and these posts were not, as I am instructed, Hudson's Bay Company's posts at all. They were the North-West Company's posts. At all events they did not become in any way Hudson's Bay Company's posts until after the fusion of the North-West Company and the Hudson's Bay Company, in or about the year 1819. They were old French posts, and would be included within the territory which, under the Quebec Act, was intended to be afforded a civil government. They were not very important posts apparently.

Lord ABERDARE.—Fort St. Pierre is one.

Mr. SCOBLE.—Yes, Fort St. Pierre is one, and Fort St. Charles another.

Lord ABERDARE.—There is a fort cited, La Maune.

Mr. SCOBLE.—There is a River à la Maune mentioned in one of the French documents, at page 624 of the Joint Appendix, and I think that is the fort

*The tract referred to is that bounded by the English River and Lakes Seul and St. Joseph on the south, the due north line from the source of the Mississippi on the west, the due north line from the confluence of the Ohio and the Mississippi on the east, and the parallel of the northerly boundary of Manitoba produced, on the north.

referred to. There is a letter from the Sieur Du L'Hut to M. de la Barre* in relation to operations in the neighbourhood of Hudson's Bay. He says, in part of his letter, at line 38, page 624, after pointing out the success he has had in interfering with the operations of the English at Hudson's Bay :

"The Klistinos, the Assenepolacs, the people from the Sapinière, the Openens Dachiling, the Outoubouhys, and Tabitibis, which comprise all the nations which are to the west of the Northern Sea, have promised to be, next spring, at the fort which I have constructed near the River à la Maune, at the bottom of Lake Alemepigon, and next summer I will construct one in the country of the Klistinos, which will be an effectual barrier."

Now the country of the Klistinos, as it is called here, would be to the north. The Lake Alemepigon is the same as Nepigon, which your Lordship will see lies within the due north line, but the fort Lamaune is north of this Lake Alemepigon, and it is within the extended boundary which the award has given us. Then Rainy Lake, your Lordships will see, is within that same contested district, and a post was established there by the French also.

Lord ABERDARE.—Fort St. Pierre, in 1731.

Mr. SCOBLE.—Yes, in 1731.

Sir ROBERT COLLIER.—Is it on the map ?

Mr. SCOBLE.—I will give your Lordship the reference in a moment.

Sir ROBERT COLLIER.—It is not mentioned in page 603.

Mr. SCOBLE.—This one, on Rainy Lake, is on the map, and is one of those mentioned in Jefferys' book, which I have already referred your Lordships to, at page 183. It is in that extract which I read from the memorandum of the Commissioner of Crown Lands, Canada, 1857 :

"At ninety-five leagues from this greatest height lies the second establishment of the French that way, called Fort St. Pierre, in the Lake des Pluies. The third is Fort St. Charles, eighty leagues further, on the Lake des Bois. The fourth is Fort Maurepas, a hundred leagues distant from the last, near the head of the Lake of Ouinipigon."

Then Fort La Reine is a little farther on. We need not trouble anything about that. It is considerably farther on. It is described as on the River of the Assiniboëls. The only ones that I need trouble your Lordships with are Fort St. Pierre, on Rainy Lake, and Fort St. Charles, on the Lake of the Woods.

Sir ROBERT COLLIER.—Is it here on the map ?

Lord ABERDARE.—Yes, it is on the lake, to the westward ; it appears to be just outside the district.

The LORD CHANCELLOR.—Fort St. Charles is in Manitoba ?

Lord ABERDARE.—The line of the award goes through the lake ; it does not give the whole.

Mr. SCOBLE.—As a matter of fact, Fort St. Charles was within the territory assigned to the United States.† The order for the erection of these posts in the territory in question, you will find at page 640 of the Joint Appendix. It appears to be a report of the Conseil de Marine, dated 7th December, 1717. It says :

"Messieurs de Vaudreuil and Begon having written last year that the discovery of the Western Sea would be advantageous to the colony, it was approved that, to reach it, M. de Vaudreuil should establish three posts which he had proposed, and he was instructed at the same time to have the same established without any expense accruing to the King, as the person establishing them would be remunerated by trade, and to send a detailed schedule of the cost of continuing the discovery. In reply, it is stated that M. de Vaudreuil, in the month of July last, caused the Sieur de la Noüe, lieutenant, to set out with eight cannon to carry out this scheme of discovery. He gave him instructions to establish the first post at the River Kamanistiquoya "—

That is just at the boundary.

* Dated 10th September, 1684.

† It was on the shore of the Lake of the Woods, but within the present United States boundary line.

Lord ABERDARE.—Fort William?

Mr. SCOBLE.—Yes, Fort William:

"He gave him instructions to establish the first post at the River Kamanistiquoya, to the north of Lake Superior, after which he is to go to Takamanigen [Takamamioüen]"—which is, as I understand, Rainy Lake—"near the Lake of the Christineaux, to establish a second, and to acquire through the Indians the information necessary for the establishment of the third, at the Lake of the Assinipoëlles [Winnipeg]."

Lord ABERDARE.—[*Referring to the Ontario boundary map*] I observe the word "Christineaux" is printed in the north-west portion of the territory given by the award,* as well as being one of the names by which Winnipeg is called.

Mr. SCOBLE.—Winnipeg Lake, I understand, is sometimes called the Lake of the Christineaux. That is the northern part of it. The other part of it is called the Lake of the Assiniboëls, after the adjoining tribe.

The LORD CHANCELLOR.—It seems to be printed to the north-west of the coloured part, and to the end of the uncoloured part.

Sir BARNES PEACOCK.—Some of the blocks of land reserved to the Hudson's Bay Company is within the Rainy Lake district. At page 317, they retain certain "posts or stations now actually possessed and occupied by them."

The LORD CHANCELLOR.—It seems to shew, whether rightly or wrongly, they had claimed to extend their territory over a portion of what was awarded to Ontario. They claim it as part of the land of which they were in possession at the time the Act passed.

Sir BARNES PEACOCK.—Yes.

Sir ROBERT COLLIER.—What they claim to be entitled to under the second section of the deed of surrender† is this:

"The Company to retain all the posts or stations now actually possessed and occupied by them, or their officers or agents, whether in Rupert's Land or in any other part of British North America, and may, within twelve months after the acceptance of the said surrender, select a block of land adjoining each of their posts or stations, within any part of British North America, not comprised in Canada and British Columbia, in conformity, except as regards the Red River territory, with a list made out by the Company and communicated to the Canadian ministers, being the list in the annexed schedule."

Therefore it becomes a question whether some of the territory set out in the schedule is comprised in Canada.

Sir BARNES PEACOCK.—They specify that.

Sir ROBERT COLLIER.—But it does not follow necessarily that they are entitled to what they specify. Then they give a list of what they claim.

Lord ABERDARE.—That is at page 319.

Sir ROBERT COLLIER.—Page 319, that is the schedule to their deed of surrender, in which they state their claim.

Sir BARNES PEACOCK.—The British Crown were to take it, and then transfer it to Canada after the surrender.

Sir ROBERT COLLIER.—This states all they claim, but it does not necessarily follow that they are entitled to all that they claim. They make very extensive claims indeed here. They assert this as not belonging to the Dominion of Canada, but I think that is a subject to be inquired into.

Sir MONTAGUE SMITH.—They agreed upon £300,000, and then the government would take in everything, whether doubtful or not. It does not shew that this was the Hudson's Bay Company's territory at the time that the government took the surrender.

* Christineaux—Kris—Crees—the Indian tribe of that name.

† Deed of Surrender of Rupert's Land, 19th November, 1869, the Governor and Company of Adventurers of England trading into Hudson's Bay, to Her Majesty.—Prefix to Stats. of Can., 1872, p. lxxvii.

Sir ROBERT COLLIER.—Where is the Act enabling the government to accept the surrender?

Mr. SCOBLE.—Page 445.*

Sir ROBERT COLLIER.—I think this Act says: "Whereas a draft surrender has been submitted to the Government of Canada." I am not quite sure whether we have had before us the draft surrender which was so submitted. Here is the Order of Council, and I do not see that the Order in Council gives them all that they claim in their schedule, as at present advised:

"The size of the blocks which the Company are to select adjoining each of their forts in the Red River limits shall be as follows:—

	Acres.
Upper Fort Garry and Town of Winnipeg, including the enclosed park around shop, and ground at the entrance of the town	500
Lower Fort Garry, (including the farm the Company now have under cultivation)	500
White Horse Plain	500."

But I do not see that this Order of Council gives them all that they claim in their schedule.

Mr. SCOBLE.—In section 2, on page 448, the next page:

"The Company are to retain the posts they actually occupy in the North-Western Territory, and may, within twelve months of the surrender, select a block of land adjoining each of its posts within any part of British North America, not comprised in Canada and British Columbia"—

The LORD CHANCELLOR.—It goes on:

—"in conformity, except as regards the Red River territory, with a list made out by the Company and communicated to the Canadian Ministers, being the list in the schedule of the aforesaid deed of surrender."

The Order in Council says it is in conformity with a list made out by the company.

Sir ROBERT COLLIER.—That is so.

Mr. SCOBLE.—As I understand, under that clause of the surrender, they have not claimed any land whatever within the limits of the bit of territory now under discussion.

The LORD CHANCELLOR.—The Order in Council says expressly that the Company may

—"select a block of land adjoining each of its posts within any part of British North America, not comprised in Canada and British Columbia, in conformity, except as regards the Red River territory, with a list made out by the Company and communicated to the Canadian ministers, being the list in the schedule of the aforesaid deed of surrender."

Lord ABERDARE.—If they did get a block at Fort St. Charles, which is within the award,† would that be an argument that that was considered as not being a portion of Upper Canada?

The LORD CHANCELLOR.—If it was proved that they did actually get it, it might be an argument, but the learned counsel says they did not get it. I should like to know whether there is any difference about it. If, independently of this, we should find a grant to Upper Canada, and there is any evidence that they actually got it, and it belonged to Upper Canada, the fact that by deed of surrender they claimed it would not at all decide it.

Mr. SCOBLE.—I understand that the statement I made just now must not be taken by your Lordships. My learned friends contest the point.

The LORD CHANCELLOR.—Very well.

* Imp. Act, 31 and 32 Vict., cap. 106. † See *ante*, p. 156, note †.

Mr. SCOBLE.—I understood there had been no land taken in the particular region, under this agreement.

My Lord, there is one matter which I may mention here, while we are upon this, which is a geographical question rather than anything else, that is, with reference to that map which the Lord Chancellor had yesterday, dated 1703. There were two lines marked on it, one line marked "*Ligne selon la prétension des Anglois*," and the other line marked "*Ligne selon le mémoire de M. d'Auteuil.*" Those two lines appear to have been put on the map at a date considerably subsequent to the date which the map bears, because although the map is dated 1703, the lines "*Selon la pretension des Anglois*" and the line "*Selon le memoire de M. d'Auteuil*" did not come into existence till 1719. The lines on this map, so far as I can make out, do not appear to be lines on the original map, but lines drawn on the map at a subsequent period. I am told they do not appear on the face of the original map itself, and I think it must be so, for this reason, that it refers to "la prétension des Anglois" of which there is no evidence whatever at the date on the map, but in 1719, your Lordship will find it at page 511 of the Joint Appendix, under the head of "Boundaries claimed by the English commissaries."* The English commissaries under the Treaty of Peace set forth the line, and at page 512 your Lordships will find the Memoir of d'Auteuil,† combating the "*pretension des Anglois*" put forward by the commissaries.

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* BOUNDARIES CLAIMED BY THE ENGLISH COMMISSARIES, 1719.

Memoir on the subject of the Limits of Hudson's Bay, sent by the English Commissaries, through Lord Stair, to the Marechal d'Estrées, one of the French Commissaries, 1719.

His Majesty, the late Most Christian King, having stipulated, by Article 10 of the Treaty of Peace concluded at Utrecht, that Hudson's Bay and Strait, with all the lands, seas, coasts, rivers, and places which appertain to them, shall be restored to the Kingdom of Great Britain; and that Commissaries shall be named on each side to determine the limits of each nation; which limits, the subjects of each nation shall not be permitted to pass by sea or land:

The Commissaries named by His Britannic Majesty demand that the said limits may be defined in the manner following, viz.: That the limits shall commence from the north cape of Davis' Bay, in lat. 56° 30′, which shall serve as limits between the English and the French, on the coast of Laboradore, towards Rupert's Land on the east main, and of New Britain on the French side; and that no French vessel, boat or ship whatsoever shall be allowed to pass to the north or the west side of the north cape of Davis' Bay, towards or into the Strait or Bay of Hudson, under any pretext whatsoever; and furthermore, that a line shall be drawn from the said north cape of Davis' Bay, towards the great lake Miscosinke or Mistoveny, dividing the said lake into two parts, and that at the place where the said line shall intersect the 49th parallel of north latitude, another line shall commence, and shall be extended on the west side from the said lake along the 49th parallel of north latitude; beyond which lines thus described, neither the French nor any other person employed by them shall pass towards the north of the said 49th parallel of north latitude, or towards the north [or] the north-west of the said lake, or supposed line, neither by land nor by water, nor traverse any river, lake or country, for the purpose of trading, nor build any fort, nor found any settlement.

And forasmuch as the subjects of His Most Christian Majesty have made, since the Peace of Utrecht, a settlement at the source of the River Albany, the Commissaries of His Britannic Majesty insist that the French shall quit the said settlement, and that the fort, if there be any such building, shall be given up to the Company of English merchants trading into Hudson's Bay aforesaid.

The said Commissaries further demand that the subjects of His Most Christian Majesty shall not build forts, or found settlements, upon any of the rivers which empty into Hudson's Bay, under any pretext whatsoever, and that the stream, and the entire navigation of all the said rivers, shall be left free to the Company of English merchants trading into Hudson's Bay, and to such Indians as shall wish to traffic with them.[1]

[1]The demand in the last paragraph was not authorised by the commissaries' instructions; nor was that of lat. 56½° as the point of commencement. They were required to demand that the line should commence at Grimington's Island, or Cape Perdrix, in lat. 58½°. (Joint App. 508, 574, 578). As late as 1750, the Company still adhered to this latter claim. (Memorial of 1750, in "Ontario Boundaries before Privy Council."

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† *Memoire* OF M. D'AUTEUIL, RESPECTING THE LIMITS OF HUDSON'S BAY, 1719-20.

[M. d'Auteuil was, at the date of the negotiations respecting the boundaries, 1719-20, Procureur-General of Canada, and had been called to Paris at the instance of the French Commissaries, as a competent authority on the question of the boundaries. He was in frequent consultation with the Commissaries, one of whom, Abbe Dubois, is known to have had constant reference to him in matters of difficulty. His two memoirs bear internal evidence of having been prepared in answer to the English demands; they were so prepared probably for the information of the French Commissaries.]

First Memoire.

* * * All these facts being laid down, of which my Lords the Commissaries will make such use as they may judge proper, I come to that which concerns the limits. On the supposition that it may be

The LORD CHANCELLOR.—This line was what at that time the British Government claimed.

Mr. SCOBLE.—Yes, my Lord, and what the French government would not agree to, and so far it illustrates, and may perhaps illustrate correctly, the statements to which I have just referred your Lordships; but as nothing whatever came of the reference, I imagine neither party is bound.

The LORD CHANCELLOR.—The line there laid down is a straight line; the boundaries as actually ascertained are irregular.

Mr. SCOBLE.—The French boundary, your Lordships will perhaps remember, runs close round the shore of Hudsons Bay: M. d'Auteuil's memoir locates the boundary there.

The LORD CHANCELLOR.—The British pretension brings it to the south of the lakes.

Sir ROBERT COLLIER.—It does not claim any territory south of the line drawn.

The LORD CHANCELLOR.—The lakes now called Winnipeg Lake and Manitoba Lake are treated as one large lake, and they also are to the north of the line marked as the boundary.

Mr. SCOBLE.—The line appears to have been drawn upon the face of the map by some one in the French Ministry of Marine, or whatever public office it is that the map proceeds from. They were not part of the map as originally drawn by the geographer. They must have been drawn in or after 1719.

The LORD CHANCELLOR.—They doubtless were drawn for the purpose of that question.

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necessary, in virtue of the 10th Article of the Treaty of Utrecht, to cede to England Fort Bourbon, and all the other establishments which are on the shores of the Bay, I say:

1st. That it is well to remark that the English, in all the places of the said Bay and Strait which they have occupied, have always stopped at the border of the sea, carrying on trade with the savages who went there to find them; whilst the French, from the foundation of the colony of Canada, have not ceased to traverse all the lands and rivers bordering on the said Bay, taking possession of all the places, and founding everywhere posts and missions.

2nd. They cannot say that any land, or river, or lake belongs to Hudson's Bay; because if all the rivers which enter into this bay, or which communicate with it, belong to it, it might be said that all New France belonged to them, the Saugenay and St. Lawrence communicating with the Bay by the lakes.

That this being incontestable, it is for France to regulate the limits in this particular quarter (*a regler les limites de ce cote la*); and that of the little which she may cede, she will always cede that which is her own, as the English cannot pretend to anything except a very small extent of the country adjoining the forts which they have possessed at the bottom of the Bay. Nevertheless their pretensions amount to nothing less than to overrun nearly all the north and west of New France, as they would also do on the south coast by extending the boundaries of Acadia as far as the Fort of Quebec, these being the propositions which the Commissaries named by the King of England have made, but which they have never signed.

[He then quotes the English claims as submitted by Lord Stair, *ante* p. 159.]

The simple reading of these propositions renders it apparent that there can be no other response to make to them than to reject them absolutely, as not having any foundation which can support them. By what right indeed, and in virtue of what treaty do these gentlemen break the Treaty of Breda, which placed our limits at the 60th parallel, in order to place them at the 49th, not only from the shore of the Bay, which has been ceded to them, but stretching toward the west in every longitude? The Treaty of Utrecht speaks only of restitution—let the English shew that which the French have taken from them, and they will restore it to them; but all that they demand beyond this, they demand without any appearance of right. Article 10 of the Treaty of Utrecht restores Hudson's Strait; why then wish that the boundary on this side should commence at the north cape of Davis' Bay, in 56½ degrees of latitude, since this cape is more than 120 leagues from the cape of Isle Bouton, at the 61st degree or thereabouts, which is the commencement of Hudson's Straits? This excessive claim would carry away a large portion of the land of Labrador, which France has not ceded.

The line of separation should then commence at Cape Bouton, pass through the middle of the territory which is between Fort Rupert and Lake Nemiskau, of which Père Albanel, Jesuit, and Mr. de St. Simon, took possession in the name of the King, in 1672; follow, at the same distance from the Bay, along the eastern side, in such manner as to divide in the middle the territory between the Lake of the Abitibis and Fort Monsipi or St. Louis; continuing, at a similar distance from the shores of the Bay, at the western side, until beyond the rivers of St. Thérèse and Bourbon.

That if on the territory which by these lines belongs to England, there should be found French settlements, they shall be destroyed; but those that may have been founded on our own lands shall be continued, each one being master of his own.

[Here follows the second *memoire*, which it is not considered necessary to reproduce.]

Mr. SCOBLE.—Most likely, to shew clearly what the claims of the parties were.

Then, my Lord. I submit, with regard to the whole of this territory covered by the Award, there is evidence to shew that it was well within the line of what may be contended to have been ceded to England by France by the Treaty of Paris, and which having been so ceded is constituted by the Act of 1774 into the Province of Quebec. The position of the Hudsons' Bay Company in regard to this territory after the cession, appears to have been precisely the same as that of any other person, who chose to come into the country—in fact it does appear upon the evidence, that after the treaty of 1763 other persons did come into that territory, in advance of the Hudson's Bay Company, and gradually, by a series of processes, established trade rights, and their right to be in this country carrying on business and settling themselves down in the various districts. Eventually these traders formed themselves into a company, called the North-West Company, which for a series of years carried on practically a civil war in that region with the servants of the Hudson's Bay Company, who had at length followed them into this region; and in the disputes which arose between the North-West Company and the Hudson's Bay Company's servants in those years, we find from the correspondence, to which I need not refer your Lordship at length, the British Government entirely declined to take any part whatever, except so far as was necessary to the protection of British subjects in these parts against the Indians, and really against one another. The position of the Hudson's Bay establishment in that part appears to have been precisely the same as that of any other adventurers who chose to come there, and they were not recognized in any way by the British Government at the time. There is a long correspondence upon that subject. Lord Bathurst was Secretary of State. Your Lordships will find it in the Ontario Appendix, beginning at page 142. On that page, at line 36, in a letter to Sir Gordon Drummond, 18th March, 1815, in reference to an application from the Hudson's Bay Company for a military force to assist them in resisting an attack apprehended from the Indian nations in the neighbourhood of the Red River, Lord Bathurst says:

"You will take a special care, whatever measures you may adopt for this purpose to abstain from doing any act or expressing any opinion which may tend to affect the question in dispute between the Hudson's Bay and North-West Companies; the sole object of the present instruction being to secure the lives and properties of Her Majesty's subjects established on the Red River, from the predatory attacks of the Indian nations in the neighbourhood, with which they state themselves to be threatened."

Then in the next letter, one from Sir Gordon Drummond to Lord Bathurst, "Castle, Quebec, August 16th, 1815," the last paragraph is the one to which I call your Lordship's attention. Sir Gordon says:

"The question as to the invasion of rights, of which the North-West and Hudson's Bay Companies mutually complain, appears to me to be entirely one of law, and one in fact on which the law can alone decide; it has therefore very properly been referred by the North-West Company to a legal tribunal."

There is a good deal more correspondence very much to the same effect, all treating the question of the right of settlement and occupation in this part of the country, about the Red River, as open to everybody after the Quebec Act and the

treaty with France. Then again, in 1817, page 146, commissioners are appointed to investigate and report upon the subject of dispute between the Hudson's Bay Company and the North-West Company, and a proclamation is issued commanding a mutual restoration of all places seized, and the removal of all blockades or impediments to the free passage of trade and traders by the accustomed communications.*

The LORD CHANCELLOR.—Are we not getting into an interminable quagmire?

Mr. SCOBLE.—I merely wished, with reference to this particular part of the country, to say it really was, except as far as men chose to occupy it, No Man's Land. It was under the government of England, exercised through the government of Canada, and anybody who chose to go and settle there, and establish posts there, could do so. The North-West Company were establishing positions there, quarrelling with the Hudson's Bay Company, and the Canadian and British governments prepared to leave them to settle their disputes in a court of law.

The LORD CHANCELLOR.—All that ended in the Rupert's Land Act.

Lord ABERDARE.—Your argument is to shew that the mere occupation of certain hunting posts in this region, which occupation was in common with other hunting associations, is no proof that it belonged to them?

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* EARL BATHURST, TO GOVERNOR-GENERAL SIR JOHN C. SHERBROOKE.

Downing Street, 6th February, 1817.

SIR,—Since I had the honour of addressing you on the subject of the disputes existing between the North-West and Hudson's Bay Companies, I have received intelligence from different quarters, of the continuance of those proceedings which have involved the whole Indian country in disturbance, and which, if a check be not early put to them, threaten to be utterly destructive of the intercourses subsisting between that country and His Majesty's dominions. To prevent consequences so fatal to both parties, and so pregnant with danger to the safety of the Canadas, His Royal Highness the Prince Regent has been pleased entirely to approve of the appointment of Mr. Coltman and Mr. Fletcher, as commissioners to investigate and report upon the subjects of dispute between the Hudson's Bay and the North-West Companies. But as much time must necessarily elapse before their report can be received and properly considered, I am commanded to signify to you His Royal Highness's pleasure that measures should be immediately taken for putting an end to those violent proceedings, which have latterly marked the contest of these two companies; and with this view, that each should be restored to the possessions held by them previous to the commencement of their recent disputes. You will therefore, upon the receipt of this despatch, issue a proclamation, in the name of the Prince Regent, calling upon the agents of each party, and upon all those whom either may have enlisted or engaged in their service, to desist from every hostile aggression or attack whatever; and in order to prevent the further employment of an unauthorized military force, you will require all officers and men composing such force to leave within a limited time the service in which they are engaged, under penalty of incurring His Royal Highness's most severe displeasure, and forfeiting every privilege to which their former employment in His Majesty's service would otherwise have entitled them.

You will also require, under similar penalties, the restitution of all forts, buildings or trading stations (with the property which they contain) which may have been seized or taken possession of by either party, to the party who originally established or constructed the same, and who were possessed of them previous to the recent disputes between the two companies. You will also require the removal of any blockade or impediment, by which any party may have attempted to prevent or interrupt the free passage of traders, or others of His Majesty's subjects, or the natives of the country, with their merchandise, furs, provisions and other effects, throughout the lakes, rivers, roads and every other usual route or communication heretofore used for the purposes of the fur trade in the interior of North America; and the full and free permission for all persons to pursue their usual and accustomed trade, without hindrance or molestation; declaring at the same time that nothing done in consequence of such proclamation shall in any degree be considered to affect the rights which may ultimately be adjudged to belong to either party, upon a full consideration of all the circumstances of their several claims. I trust that the parties themselves will understand their own interests too well, not to yield a ready obedience to the commands of His Royal Highness, but in order to ensure it you will not hesitate to arm the commissioners with such additional authority as you may consider requisite to enforce the proclamation, and to take every other measure in your power for securing the objects which His Royal Highness has in view, namely, the cessation of all hostility both in Canada and the Indian country, and the mutual restoration of all property captured during these disputes, and the freedom of trade and intercourse with the Indians, until the trials now pending can be brought to a judicial decision, and the great question at issue with respect to the rights of the two companies shall be definitely settled.

I have the honour to be, etc.,

BATHURST.

Lieut.-General Sir John C. Sherbrooke, G. C. B., etc., etc.

Mr. SCOBLE.—No proof that the territory belonged to them.

Lord ABERDARE.—You are directing your argument to that particular point?

Mr SCOBLE.—Yes.

I do not think that there is any other matter that I have to bring to your Lordships' notice upon this case. I think the evidence amply shews that the Arbitrators were perfectly justified, by considerations of law and fact, in adopting the line which they did, which has been admitted to be a convenient line; and I ask your Lordships to confirm their Award.

[*Their Lordships consulted.*]

The LORD CHANCELLOR.—Their Lordships desire it to be understood that they will only hear two counsel, and if counsel for the Dominion of Canada and the Province of Manitoba wish each to be heard, they will settle among themselves who are to be heard among the various counsel retained; but it is one case, and there will be only two counsel heard. Then, secondly, their Lordships do not desire that you should travel into the question of any indefinite extension of the limits of Canada, north or west. They consider the true question to be the present identification of the boundaries laid down in the Quebec Act.

Mr. MCCARTHY.—The point, my Lord, upon which the Province of Ontario must satisfy your Lordships, in order to sustain the claim to which they have now limited the demand of the province, is, first, that the due north line is not the proper line on the west; that proposition we deny. Secondly, if it be not the due north line, but that the line taken by my learned friend is the proper line to follow on the west, along the bank of the Mississippi, then, in order to get the determining point, it appears to me that the province is bound to shew where the southern boundary of the Hudson's Bay territory was and is, because, until you get to that southern boundary, the line is not fixed. If, for instance, you follow up the eastern bank of the Mississippi, and you come to the height of land, and that height of land was the southern boundary of the Hudson's Bay territory, then the course, in order to find the western boundary, would be to follow that height of land. If that be not taken as the southern boundary of the Hudson's Bay territory mentioned in the grant, then I am at a loss to know where my learned friend would ask your Lordships to stop. The award of the arbitrators assumed that there was no Hudson's Bay territory; they penetrated through this height of land of which I am now speaking; they went to the north-west angle of the Lake of the Woods; and then they went north for a certain distance to that point of the English River—due north.

The LORD CHANCELLOR.—They adopted apparently the line really laid down on Mitchell's map.

Mr. MCCARTHY.—I think I shall be able to shew your Lordships that that was not treated at any time as being properly or carefully noted. In point of fact, as to this part of the country, the geographers of that day were in great ignorance.

The LORD CHANCELLOR.—Are you going to shew us what took place before the award?

Mr. MCCARTHY.—I am going to shew your Lordships that the only theory upon which the award can be supported is, by penetrating this height of land to the north-west angle of the Lake of the Woods.

The LORD CHANCELLOR.—We have not anything before us at present which points to that height of land at all.

Mr. McCarthy.—My suggestion, if your Lordship will allow me, is, if that height of land be not taken, where is the line to stop? That is one of the difficulties that has always occurred to me.

The Lord Chancellor.—At present, upon the evidence, you have got certain limits laid down in certain documents, in the Quebec Act, a most authoritative document, and, to identify them, a map is produced giving the line of those lakes and the English River as the southern boundary of the Hudson's Bay territory. These seem at all events to lead to the conclusion which the award has arrived at, and they have to be answered.

Mr. McCarthy.—Yes, my Lord. Your Lordship will see the award first follows English River, then up to Lac Seul, and Lake St. Joseph; it then takes the Albany River, and goes to Hudson's Bay.

The Lord Chancellor.—You will observe, if the rest of the territory, farther east, is assumed to be correctly laid down, it is a consistent water boundary. The water boundary starts from Hudson's Bay, going up the Albany River to Lake St. Joseph, then on to the English River, and so out on Manitoba territory. If any natural boundary is to be regarded at all, that seems to be a very feasible natural boundary.

Mr. McCarthy.—It entirely ignores any rights of the Hudson's Bay Company. The line by the award is from Fort Rupert on the east, stretching to the Albany River on the west. Supposing there be any part that the Hudson's Bay Company were clearly entitled to between these two points, it is where they first settled and where they continuously occupied, and yet the award takes from the company that part of their territory to which beyond all question they are most clearly entitled.

Lord Aberdare.—The award did not deal with this question of the addition to Ontario.

Mr. McCarthy.—Oh, yes, my Lord, the award started on the east at Fort Rupert, and then went along James' Bay until it struck the Albany River.

The Lord Chancellor.—It is not that the arbitrators considered that to be the boundary in that direction; their office was to arbitrate between the Dominion and Ontario.

Mr. McCarthy.—The Dominion were alone entitled, at the date of the arbitration, to both north and west. Since the award, Manitoba has come in upon the west, but at the time of the award the Dominion was the owner both to the north and west. What I am pointing out is this, that if the due north line is followed to the north, a plain consistent line, of course that would end your Lordships' labours; but if the due north line be not followed, and the Mississippi course be taken, as is urged on the other side, then in order to find out where the western line is, it is necessary to find where the Hudson's Bay territory ended. If it ended, as we contend, at the height of land, then your Lordships will see the effect that will have upon the western limit Where it appeared to me that my learned friends' arguments were inconclusive, was that they gave your Lordships no data, assuming the Mississippi was the proper course to take, where that should stop.

The Lord Chancellor.—This map [*Mitchell's*] is evidence.

Mr. McCarthy.—Conceding for the moment that that map is some evidence, and I think I shall be able to shew that it is not, it may not be unimportant, at the opening, to point out what were the rival claims, for the Dominion and the Province, when this reference was made. The Dominion claimed, consistently, all along, for the due north line, relying upon the construction of the Quebec Act which we propose to contend for here before your Lordships. The Province, upon

being appealed to to say what boundary they wanted, fixed the limit which will be found at page 334 of the Joint Appendix. And it is useful in a twofold sense; it is useful, in the first place, as shewing—although, as I will point out, it was subject, if not accepted, to a greater claim being made—what the Province then was content with, and, secondly, as indicating that the Hudson's Bay Company's rights went to the height of land: *

"The boundary line of Ontario is the international boundary from the mouth of Pigeon River"—

The LORD CHANCELLOR.—What was the origin of this document?

Mr. MCCARTHY.—After Rupert's Land had been added to the Dominion, the Dominion formulated their contention, which was, as I have said, the due north line. Then the Province is called upon to name the boundary it wanted, and that is done by the Order in Council of 19th April, 1872, on page 333.

The LORD CHANCELLOR.—This is the Ontario claim, stated by them in 1872?

Mr. MCCARTHY.—Yes.

"The Committee of Council have had under consideration the despatch from the Secretary for the Provinces, of the 10th instant, on the subject of the boundary line of Ontario, and the copy of an approved Minute of the Privy Council of Canada enclosed. In this Minute the Privy Council regrets 'that the government of Ontario, while expressing their difference of opinion from that of the Dominion, omitted to give their own views on the subject, and did not state what their claim as to the location of the boundary was.' The committee would observe that the despatch on which their minute was founded did not contain any invitation to the government of Ontario to express its views, or state its claim. The government of Ontario is now invited to do so, and the committee advise that the government of Canada should be informed that this government proposes the boundary contained in the annexed description."†

Now we come to the description:

"The boundary line of Ontario is the international boundary from the mouth of the Pigeon River, on Lake Superior, to a point west of the Lake of the Woods, where the international boundary line would be intersected by a line drawn north from the source of the Mississippi River; thence the boundary line of Ontario runs north to the point of intersection of the southern boundary of the Hudson's Bay territories; thence the boundary line of Ontario is the southern boundary of those territories, to the point where that boundary would be intersected by a line drawn north from the head of Lake Temiscaming."

The LORD CHANCELLOR.—Is that the one actually adopted by the award?

* On the contrary, the government of Ontario, even at this early period, before some of the important evidence bearing upon the point had yet come to their knowledge, maintained "that the northern boundary lies north of the watershed of the St. Lawrence system." See note †, *infra*.

† The two remaining paragraphs of the Order in Council are as follows:

The committee further advise that the government of Canada should be informed, that as to the western limit, in the opinion of this government, there are grounds for maintaining the contention of former governments of Canada, that the limit of Ontario is further west than the one proposed in the description, and that, while this government is prepared, in view of all the circumstances, to agree to the western limit so proposed, in case the same is accepted by the government of Canada, this government does not consider itself bound by the proposal in any other event.

As to the northern limit, it will be observed, from the description, that this government maintains the position, which is supported by the contentions of all former governments, and by the indisputable facts, that the northern boundary lies north of the watershed of the St. Lawrence system, the line of which watershed is the northern boundary laid down by the government of Canada; and the committee advise that the government of Canada should be informed that, in view of all the circumstances, this government will be prepared, in case its position as to the northern boundary is agreed to by the government of Canada, to consider any proposal which may be made by that government for the establishment of a conventional limit to the north of that watershed.

Mr. McCarthy.—No. They adopted the western limit at the Lake of the Woods. Instead of treating the Hudson's Bay territory as existing in fact, if at all, they ignored the Hudson's Bay Company having any claim.

The Lord Chancellor.—I am afraid I do not see the topography exactly. The Hudson's Bay claim, in 1755, appears, so far as the question now in dispute, to have been limited to the water line—the water line of English River and the lakes. That is all we have at present upon it. Farther east, we know nothing as to the boundary, but I want to know whether that is different in your view from what is here claimed.

Mr. McCarthy.—Oh, yes, my Lord. The claim, according to that map, would have been to the height of the land.

The Lord Chancellor.—There is not a word about it.

Mr. McCarthy.—It says the Hudson's Bay territories.

The Lord Chancellor.—We have Mitchell's map laying down the southern limit of the Hudson's Bay territory.

Mr. McCarthy.—Perhaps I may as well state that we propose to satisfy your Lordships that the Hudson's Bay territories were either bounded by the 49th parallel or by the height of land.

The Lord Chancellor.—At present we know nothing about either the one or the other.

Sir Montague Smith.—The proposed boundary, mentioned at page 334, is what the Dominion proposed?

Mr. McCarthy.—No, that is what Ontario proposed. The Dominion proposed the due north line. Your Lordships will see by the next sentence of the letter. It may perhaps be as well, my Lords, to look at this map of Mitchell's,* which your Lordships think affords some evidence in favour of the view taken by the arbitrators [*producing Mitchell's map to their Lordships*]. Now this map, beyond a certain point, may be said to be, I think, so wholly wrong as to form no guide whatever. The first thing which I find in the map is, that the height of land is laid down and stated to be the boundary of the Hudson's Bay territory. That is the first thing I point out to your Lordships. You see it says "by the Treaty of Utrecht."

The Lord Chancellor.—The height of land does not seem to be connected with the words Treaty of Utrecht—"Bounds of Hudson's Bay by the Treaty of Utrecht." Then you may say that the thing is continued, no doubt.

Mr. McCarthy.—That is what I mean.

Lord Aberdare.—That is not the land's height.

Mr. McCarthy.—Yes, at that particular part, that is the land's height. But what this geographer, or mapper, did not know, or did not mark down, was that this land's height came down here [*indicating the position of the height of land to the west of Lake Superior*].

Lord Aberdare.—Perhaps that is because the land's height at that particular part ceased to be the boundary, and that is perfectly consistent with the descriptions constantly given by the English commissions to go to the north-west point of the Lake of the Woods. Now the north-west point of the Lake of the Woods is certainly on the northern side of the watershed. There is the Lake of the Woods, and here comes the height of land [*pointing on Mitchell's map*].

Mr. McCarthy.—From this point here there is then another height of land, so to speak, not properly speaking what the Americans term, very expressively, "a divide," but a height of land that runs to Split Lake.† These rivers here all drain round Split Lake into Hudson's Bay, but this is the separating range of hills.

* See *ante*, p. 107, note.

† See *ante*, p. 7, note †.

The LORD CHANCELLOR.—This also drains into Hudson's Bay.

Mr. MCCARTHY.—Yes; but then this is the division; the true height of land comes down here.

Lord ABERDARE.—That may be admitted, but it does not follow, although the general rule was that the Hudson's Bay Company should have the height of land as their limit, that it was universal, when we find that the north portion of the Lake of the Woods, which clearly was inside the height of land, was claimed by the British government as the proper boundary of Canada.

Mr. MCCARTHY.—I think I shall be able to explain that when I come to it.

Sir ROBERT COLLIER.—I understand the pink is the Hudson's Bay territory, and this is Canada [*referring to the same map*].

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—The descriptions in the commissions seem to be perfectly consistent with this map, which is older than they.

Mr. MCCARTHY.—The commissioners of the Treaty of Utrecht, does your Lordship mean?

Lord ABERDARE.—The commissions of Carleton and Dorchester — not the Treaty of Utrecht.

Sir ROBERT COLLIER.—According to this map, it goes farther west than the Lake of the Woods, and a little to the north of it.

Mr. MCCARTHY.—Lake Christineaux is shewn *there*, but Lake Christineaux is *here* [*pointing on the map*].

Lord ABERDARE.—You will find that the name Christineaux extends over a considerable district.

Mr. MCCARTHY.—But this is the Christineaux Lake. There is no such lake as that which is shewn here at all.

Lord ABERDARE.—That is a minor matter.

Mr. MCCARTHY. — Then the Albany River they take as the boundary connecting with the Lake of the Woods, which your Lordship will see is hundreds of miles on that map from the Lake of the Woods.

Lord ABERDARE.—The Albany River really represents the outflow of these lakes.

Mr. MCCARTHY [*pointing, on the same map*].—There is James' Bay, and there is the Albany River. This is the English River. That lake there is Lake Manitoba. This lake is west of that, and there is no lake there at all corresponding to it on the correct map put in.

Sir ROBERT COLLIER.—It is an incorrect map no doubt.

Lord ABERDARE.—It does not follow because you may find mistakes here and there that its main broad lines may not be right.

Mr. MCCARTHY.—What I want to point out is that the arbitrators could not have followed that. Here is the Hudson's Bay territory according to that.

Lord ABERDARE.—Here where the English River is?

Mr. MCCARTHY.—But the arbitrators have followed this course. They have followed the Albany River. That is their award. They follow from the Lake of the Woods here; and there they follow the chain of water; and then they get to the Albany River, taking the Hudson's Bay shore to the Frenchman's River, or the Rupert, which is this point here.

Lord ABERDARE.—I thought the point referred to the arbitrators was the question as between Ontario and Manitoba.

Mr. MCCARTHY.—No, my Lord; the arbitrators were dealing with the Dominion. The original Manitoba only was then in existence, whose limits did not approach the Lake of the Woods, and the arbitrators were finding the

northern and western boundaries of Ontario, and what they did was to follow up this chain of lakes here and go to James' Bay, taking from the Hudson's Bay Company all that country which undoubtedly, according to every contention, was treated as the Hudson's Bay territory, if the charter was good for anything at all. If I am correct in my contention that you must first find this boundary, that is the southern boundary of the Hudson's Bay territory, in order to determine the western limit, then the arbitrators were all wrong.

Lord ABERDARE.—Then, according to your argument, the arbitrators should have followed the line of the height of the ground.

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—That would have brought them down here [*pointing on the map*].

Mr. MCCARTHY.—That would have brought them to the boundary between the States and Canada.

Lord ABERDARE.—Then the whole of the Lake of the Woods would become a portion of the Hudson's Bay claim ?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—Then how is that consistent with the description given in the commissions ?

Mr. MCCARTHY.—That I will point out when I come to them, more clearly.

Sir ROBERT COLLIER.—This map does determine the southern boundary, if it is necessary.

Mr. MCCARTHY.—We do not admit the correctness of that map.

Sir ROBERT COLLIER.—But taking that map, this is the southern boundary.

Mr. MCCARTHY.—Yes, but then the arbitrators have gone far north of that.

Sir ROBERT COLLIER.—That is another thing. I was only dealing with the necessity of determining the southern boundary.

The LORD CHANCELLOR.—I find on this map which we have been furnished with—Mitchell's map—the line is laid down just to the south of that chain of water, and then it goes on eastward.

Lord ABERDARE.—Were the arbitrators instructed to find the historical fact as to this boundary, or entrusted with the power of laying out what they might think, having regard to the general historical facts, the most convenient boundary ?

Mr. MCCARTHY.—There has always been a doubt on the construction of the Orders in Council. I suppose the proper construction of the Orders in Council was that they were to find the true limit, but the Ontario government seems to have thought it was possible that a different construction might be open, because the legislature of Ontario passed an Act saying whether it was the true limit or not, still they assented to it being made the boundary.

Sir ROBERT COLLIER.—That is, they confirmed the award simply.

Mr. MCCARTHY.—Whether it was the true line or not.

Sir ROBERT COLLIER.—That is to say, it could not be questioned.

Mr. MCCARTHY.—Now one other preliminary point before I go into the argument which we propose to advance, and that is as to the territory that my learned friend told you Ontario had if limited by the due north line, and which Ontario would have if the arbitration line was accepted as the correct one. My learned friend has been quite right in stating to your Lordships the territory in one way and the other, but the extent of territory has but very little to do in a question of this kind, as between the different provinces of the Dominion. It is population by which, and properly so, the representation of the provinces in the Dominion Parliament is regulated, and already Ontario has, out of 211 members,

92, although the territory, as my learned friend the Attorney-General for Ontario pointed out, was much less in dimensions than the other provinces.

Lord ABERDARE.—But it has much the larger population.

Mr. MCCARTHY.—In point of fact it may be called the garden of the Dominion, and if this territory, as awarded, was given to Ontario, and if it was, which I have to say frankly it is not, included in the Province of Ontario, it would be impossible that the confederation could hold together. As a matter of fact, between Lake Superior and Fort William, or between the height of land and the north-west angle of the Lake of the Woods, it is not arable land. This is not land that can be useful for settlement. There are minerals there, but it is chiefly valuable to the province I represent here on account of its timber wealth, which Ontario does not require, but which Manitoba, being a prairie province, does require for its purposes. That is all I need say about that, because I do not suppose that your Lordships will be influenced in the least degree by considerations as to the extent, when the question really is—and what the provinces of the Dominion are anxious to ascertain is—what is the true limit, according to the proper line, and according to the British North America Act, by which all these provinces consented to come together.

Now a word more about the geographical part of the southern country—southern so far as this question is concerned—before I go into the other considerations. I deny wholly that Canada, so called, ever extended to the Mississippi—that is, French Canada. Between what was, properly speaking, called Canada and the Mississippi there was the country subsequently called the Illinois country, so termed by the French, which the English, in the days of Mr. Pitt, utterly denied belonged to France.* On the Mississippi, undoubtedly, from 1670, the French had been penetrating through the Wisconsin River, and by the Ohio River, and had gone down to the mouth of the Mississippi, and discovered the Mississippi mouth by sea also, and they then claimed, having made that discovery, to appropriate out of this continent all the country that was drained by the Mississippi. When the settlement, after the cession of Montreal to General Amherst, came to be dealt with—and your Lordship will bear this fact in mind—when Montreal capitulated, and General Amherst became entitled to Canada, the line marked down as the western limit of Canada was the Illinois line on one side, and the apex was this Red Lake, where practically the Mississippi rises,† to the north-west. Then, that left that great country, between the lines which I will point out more in detail in a moment and the Mississippi; and both sides were insisting that that should be kept as a neutral belt.‡ Perhaps I cannot make myself clearer than by saying it was pretty much as England and Russia are to-day

*It is an established historical fact that French Canada *did* extend to the Mississippi, and indeed beyond—to the line separating it in that quarter from Louisiana, viz., the height of land dividing the waters that fall into the Mississippi proper from those that fall into the Missouri. (See *ante*, p. 142, note ‡.) A chain of forts, established by Canadian officers, extended along the river from the Illinois upwards, with some also on its tributaries both westerly and easterly. (Joint App. 643-4.) Fort St. Nicolas (Prairie du Chien), at the junction of the Wisconsin with the Mississippi, was one of the most important of these (Ontario App. 39, 98); and Fort St. Antoine, higher up the Mississippi, was the post from which Nicolas Perrot dated his record of the taking formal possession, by order of the Marquis de Denonville, Governor of Canada, of all the countries of the Upper Mississippi, in 1689. (See this record *ante*, p. 147, note). It is among the Canadian posts and settlements enumerated in Governor Pownall's account, in 1756, who describes the settlement as "a fine one." (Joint App. 603). The Country of the Illinois, so called, was variously a dependency of Canada or of Louisiana according as the King exercised his pleasure in regard to it; it was strongly fortified, and garrisoned by a large force of regulars; and was as emphatically a French possession as was Quebec or Montreal (Joint App. pp. 603-4, 641, 644, 651-2); and this England never denied, nor could deny, either in Mr. Pitt's or any other time.

†The waters of the Red Lake discharge not into the Mississippi, as erroneously shewn on many of the old maps, but by Red Lake River into the Red River of the North.

‡ The proposed neutral belt did not at all embrace any portion of the territory in question on this reference.

claiming that there should be a neutral belt as it were between the two empires in Asia. I will point out that correspondence, if it be at all disputed, in detail. That went on to 1761, the capitulation of Montreal being in 1759. In 1763, the treaty was made by which the French ceded Canada, in the first place, and its dependencies, and finally, for the purpose of establishing a boundary, not merely for this north country, but, your Lordships will find, down to the Gulf of Mexico. They fixed the Mississippi as the limit between the British possessions, on the one side, and the French, on the other. It is not very difficult to understand why France, having now lost, by the capitulation of Montreal, what is properly called Canada—that only being claimed—were willing to give up to the Mississippi, because, by a secret treaty made in 1762, a year before the Treaty of Paris, they ceded Louisiana to Spain, although that treaty was kept secret. So that it became unimportant for the French to contend for having an intermediate territory which it would be utterly impossible for them to hold.

Now, my Lords, we contend that this view is important, with reference to the construction which has to be placed upon the Quebec Act, and I will point out very briefly—because my learned friend, Mr. Robinson, who represents the Dominion, will deal with it more in detail—what on that question our contention is. Your Lordships have heard the Quebec Act of 1774 read, and your Lordships bear in mind that in 1763 a small province had been constituted, by Order in Council, or by Proclamation, speaking generally, to the east of Lake Ontario. In 1774, eleven years afterwards, it was proposed to enlarge that province, and we do not dispute on our side that the recitals in that Act make it abundantly plain that the object of the enlargement was to take in French colonies and settlements; but what we do say is, that the Act never intended to make it—and for obvious reasons—part of the Province of Quebec, as to which, your Lordships remember, the French were mainly interested, the Roman Catholic religion being made the religion of the country—they never proposed, we say, to include, anything beyond what was properly called Canada.*

The Lord Chancellor.—What do you mean by saying that the Roman Catholic religion was made the religion of the country? The existing Roman Catholic establishments were supported and maintained.

Mr. McCarthy.—It goes to this extent, that it permitted representation of the Roman Catholics, and Roman Catholics to be representatives. It acknowledged the legality of their religion, which at that time was not acknowledged in this country.

The Lord Chancellor.—There being no rights established beyond what were found existing.

Mr. McCarthy.—There was a good deal of feeling at the time, judging by contemporaneous literature, with reference to the extension of that favour to the Roman Catholic faith.

Now, perhaps, I may prove to your Lordships what I have said by reference to the correspondence,† which shews what was the true limit of Canada. It

* The claim that Quebec was limited on the west by the due north line, is an acknowledgment that the greater part of the Illinois country, and therefore something that was not Canada, was embraced in that Province. See *post*, p. 175, note*.

†The Vaudreuil-Haldimand Affair, respecting the Limits of Canada, 1759.

M. de Vaudreuil to the Duc de Choiseul.

October 30, 1761.

My Lord,—I was astonished to see, by the historical account of the Memorial of the negotiations between France and England, what I am charged with by the English, with regard to the limits of Canada, as it is entirely false and groundless. I shall give your Grace a true account of what passed between Mr. Amherst and me on that head. When I capitulated, I traced no limits whatever, and in all the messages that passed between the English general and me, I made use of the word "Canada" only. Eight or ten

your Lordships will look at page 518, your Lordships will see how the difficulty arose. It is a communication from Vaudreuil to the Minister, complaining of a publication that had been made in England with reference to what he had ceded in Canada:

"I was astonished to see, by the historical account of the Memorial of the negotiations between France and England, what I am charged with by the English with regard to the limits of Canada, as it is entirely false and groundless. I shall give your Grace a true account of what passed between Mr. Amherst and me on that head. When I capitulated, I traced no limits whatever, and in all the messages that passed between the English general and me I made use of the word 'Canada,' only. Eight or ten days after the

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days after the surrender of the country, he sent an officer to me for maps, to inform him of the extent of the colony. I returned for answer, that I had none, my maps having been taken away with my baggage at Quebec, in breach of the capitulation of that place; and the officer then shewing me a map which he had in his hand, I told him the limits marked on it were not just, and verbally mentioned others, extending Louisiana, on one side, to the carrying-place of the Miamis, which is the height of the lands whose rivers run into the Ouabache, and on the other to the head waters of the Illinois.

What I have the honour to tell you, my Lord, is strictly true; I am not afraid that the English can produce any proof to the contrary—for nothing passed in writing, on this head, nor was any line drawn on any map. I take the first opportunity to acquaint you with this, to prevent any further imposition.

General Amherst to Colonel Haldimand.

New York, 1st November, 1762.

Dear Sir,—I have been twenty times at the point of writing to you, on a subject which, though of no consequence, I should be glad to know the exact transactions that passed. When I made a report of Canada to the Secretary of State, I transmitted a copy of the part of the map where the limits between Canada and Louisiana were marked, which you delivered to me, and which I acquainted the Secretary of State were done by M. de Vaudreuil. Whether by him, or done in his presence by his direction, comes to the same thing, and the thing itself is of no sort of consequence, as the letter and the orders he (Monsieur de Vaudreuil) sent to the officers commanding at Michillimakinach, the Bay, Oocciatanon, Miamis, etc., mark out the boundaries and expressly include those posts in Canada, so that there can be no dispute about it; yet as I see some altercation has passed in England and France about Monsieur de Vaudreuil's giving the boundaries, I should be glad to know whether he marked the map himself, or whether it was done in his presence, and what passed on that subject; that I may hereafter be able to say all that was done regarding the whole affair.

I am, with great truth, Dear Sir,
Your most obedient, humble servant,
Jeff. Amherst.

Colonel Haldimand to General Amherst.

[Translation from the French of the original.]

Three Rivers, 10th December, 1762.
Despatched 16th do.

Sir,—I have received with pleasure the letter your Excellency did me the honour of writing to me on the first of December, respecting what passed between Mons. de Vaudreuil and myself on the subject of the limits of Canada. Several times I thought of forestalling it, but I deemed myself obliged to await these orders, to which I intend to conform with all the exactness possible.

About five or six days after I had entered Mont Réal, I asked M. de Vaudreuil if he had no plans, memoirs, or instructive maps concerning Canada. I asked him to let me have them in order that I might forward them to your Excellency. He replied that he had none, having lost them all at Quebec, and (to avoid hearing the enumeration he wished to make of his other losses) I contented myself for the time with this reply; but having occasion to speak of it again some days after, he told me that he had found a couple of maps, and passing into another room he had a large map of North America brought; it was made by hand and folded in the cover of an atlas. There were also some bad plans of forts in a separate roll. Not finding anything instructive on this map, and remembering that I had seen it printed, I called Lieutenant Herring of our battalion, who was in the parlour, and I gave it to him with the other papers, which he took to my house. Finally, on the morning of the day that Mons. de Vaudreuil left, this map came under my notice, and reminded me of the vain attempts I had made to discover from him and from others the extent of this country, and gave birth to the idea of examining it with M. de Vaudreuil. I immediately went to him, getting Ensign Monin to carry the map. I found M. de Vaudreuil, with several members of his household, in the room that overlooks the street; I begged him, without any other preamble, to be kind enough to shew me the limits of Canada, and conducting him towards the table which was at the end of the room, I opened the map, and after examining it a few moments, I reiterated my request. He appeared very much surprised, and, as he did not answer me, I passed my finger along the Illinois River, saying: Here is the Illinois (*les Illinois*). Then, he replied that the Illinois (*les Illinois*) had been contested by the two Governors, but that it had been decided they should belong to Louisiana, upon which I took a pencil out of my pocket, and resting my elbows on the map, while M. de Vaudreuil stood beside me, I asked him, shewing him the north of the Mississippi, if the line passed that: and he having said Yes, I marked the points from the source of the Illinois, returning up the Mississippi; and asking him once again if I marked correctly, he answered me in these words, (he, M. le Marquis de Vaudreuil, having his eyes fixed upon the map), "*Take all the north, take all the north.*" Then I pointed to Red Lake, which seemed to me the natural limit, without his making the slightest objection; after which, I returned on the other

surrender of the country he sent an officer to me for maps, to inform him of the extent of the colony. I returned for answer that I had none, my maps having been taken away with my baggage at Quebec, in breach of the capitulation of that place; and the officer then shewing me a map which he had in his hand, I told him the limits marked on it were not just, and verbally mentioned others, extending Louisiana on one side to the carrying place of the Miamis, which is the height of the lands whose rivers run into the Ouabache, and on the other to the head waters of the Illinois. What I have the honor to tell you, my Lord, is strictly true,"

and so on. Then General Amherst writes to Colonel Haldimand, who is the officer referred to as having been sent to the French General, and that letter you will find on page 519. It is simply asking him to state in detail what did take place at this interview between the French officer and himself, as representing General Amherst:

"About five or six days after I had entered Montreal, I asked M. de Vaudreuil if he had no plans, memoirs, or instructive maps concerning Canada."

I need not read it all down, but he speaks about their being lost. Then, at line 40:

"I found M. de Vaudreuil, with several members of his household, in the room that overlooks the street. I begged him, without any other preamble, to be kind enough

side of the Illinois, and not fancying that Loio could even be contested, I said to him, Here we undoubtedly take the mouth of the Wabache; and putting my pencil upon the confluence of the Loio and the Mississippi, I traced a line, again coming up this first river and the Wabache, and joining the point where I had commenced at the source of the Illinois. M. de Vaudreuil still stood beside me and looked at the map without making any objection. This line through its different windings, though made off-hand, still gave him plenty of time. But whether, being occupied with his departure, he said Yes, indifferently, and without giving it the necessary attention, or that in giving a tacit approbation, he sought to give me an erroneous impression—the account which I have related to you, Sir, is none the less the most exact truth.

M. de Vaudreuil, and all the French who remained at Mont Réal, were to leave this day. The companies of militia having assembled to give up their arms, and to take the oath of allegiance, I had no time to examine this map, and as I thought I understood what was meant by the name of Canada, and that the line was well marked, I closed the map and sent it home by Ensign Monin. Finally, Sir, you may rest assured that the map which you have in your hands is the same that was given to me by M. de Vaudreuil eight or ten days after the taking of Mont Réal, and that Lieutenant Herring, who is, I believe, at New York, carried to my house; that it is the same map that was brought back by Ensign Monin to M. de Vaudreuil on the morning of his departure; and that when I opened it in his room, there were neither lines, nor marks, nor anything to designate the limits; that the line which now marks them has been traced solely by myself under the eyes of M. de Vaudreuil, to whom alone I addressed myself; and by all that he told me, I never for a moment doubted that he gave me this line as the true limits of Canada; and that from the moment I closed this map in his room until I remitted it to your hands, there has been no alteration of any kind whatsoever made in this line.

This, Sir, is, on my word, the simple truth of this transaction.

I must own to you, Sir, that being convinced that you would ask for intelligence at an earlier date (of the extent of a country which, I believe, never had any fixed limits) of an authentic act made in virtue of the capitulation, I did not think it seemly to have the map signed by M. de Vaudreuil, which would have been as easy a matter as to make him give me the limits of Canada in writing, which he could not have refused to do in virtue of the capitulation, and which would have rendered this act incontestable; whilst having no signature to shew, he can always make his party believe that we tried to overreach him.

If I have misunderstood Your Excellency, I am very sorry, and make my apologies; and when I sent the map to Your Excellency, and told you that the limits had been drawn by M. de Vaudreuil, I meant that they had been drawn under his own eyes and received his approbation, which is true to the letter.

I am further much pleased that this ugly piece of chicanery of M. de Vaudreuil does not prejudice our affairs in the slightest; but, on the other hand, it has given me a good lesson which I will remember, if at any future time I am fortunate enough to be able to put it into practice.

I have the honour to be, Sir,
With profound respect,
Your Excellency's most humble and most obedient servant,
10th Xbre. FRED. HALDIMAND.

General Amherst to Colonel Haldimand.

NEW YORK, 25th January, 1763.

DEAR SIR,—* * * I am much obliged to you for the particular and exact detail you have sent to me of what passed between yourself and Monsieur de Vaudreuil. It is almost precisely as I imagined. It is of no consequence whatever; but if it was, there could be none but good proceeding from what you did in that affair, which has my thorough approbation to every part of it. * * *

I am, with great truth, Dear Sir,
Your most obedient and humble servant,
JEFF. AMHERST.

to shew me the limits of Canada, and conducting him towards the table that was at the end of the room, I opened the map, and after examining it a few moments, I reiterated my request. He appeared very much surprised, and as he did not answer me, I passed my finger along the Illinois River, saying: Here is the Illinois. Then he replied that the Illinois had been contested by the two governors"—

that was between the governor of Louisiana and himself as governor.

Lord ABERDARE.—As to whether it belonged to Canada or Louisiana?

Mr. MCCARTHY.—Yes:

"But that it had been decided they should belong to Louisiana, upon which I took a pencil out of my pocket, and resting my elbows on the map, while M. de Vaudreuil stood beside me, I asked him, showing him the north of the Mississippi, if the line passed that, and he having said Yes, I marked the points from the source of the Illinois, returning up the Mississippi; and asking him once again if I marked correctly, he answered me in these words: '*Take all the north, take all the north.*' Then I pointed to the Red Lake, which seemed to me the natural limit"—

Lord ABERDARE.—Is that the Red Lake near the source of the Mississippi?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—Are you sure of that?

Mr. MCCARTHY.—Yes, I think it is perfectly plain. I will show your Lordships a map we have—a tracing from a map at the Foreign Office, sent to us by Sir Michael Hicks-Beach:

"Then I pointed to Red Lake, which seemed to me the natural limit, without his making the slightest objection; after which I returned on the other side of the Illinois, and not fancying that Loio could even be contested,"—that is the Ohio, no doubt—"I said to him, Here we undoubtedly take the mouth of the Wabache; and putting my pencil on the confluence of the Loio and the Mississippi, I traced a line, again coming up this first river and the Wabache, and joining the point where I had commenced, at the source of the Illinois, M. de Vaudreuil still beside me and looking at the map, without making any objection whatsoever. This line, through its different windings, though made off-hand, still gave him plenty of time. But whether, being occupied with his departure, he said Yes, indifferently, and without giving it the necessary attention, or that in giving a tacit approbation he sought to give me an erroneous impression—the account which I have related to you, Sir, is none the less the most exact truth."

The LORD CHANCELLOR.—We shall follow this much better if you tell us for what purpose you quote this.

Mr. MCCARTHY.—I am quoting it for this purpose, that this line, which is afterwards insisted upon by the English as the western limit of Canada, was far to the east of the Mississippi. The French, in the negotiations which took place afterwards, contended that the lakes were the boundary of Canada—Lake Huron, Lake Michigan, and Lake Superior. That, they said, was the true boundary of Canada, and the English indignantly repudiated that, Mr. Pitt saying it was unbecoming conduct, and that the tracing made at this interview between Colonel Haldimand and Vaudreuil should be the governing line; but that governing line was altogether—as the description I have read, if your Lordships could follow it, would shew—to the east of the Mississippi.

The LORD CHANCELLOR.—Following the Mississippi up to the Red Lake, you get to the head waters of the Mississippi?

Mr. MCCARTHY.—I will shew your Lordships a sketch from the Foreign Office which we have on the subject. We cannot say positively this is right, but it is a record at the Foreign Office, and it shews the line which we say is the line marked down on that map. That is the sketch from the Foreign Office, and that

is the line we say was then traced, and your Lordships will see the difference [*handing sketch to their Lordships*].

Sir ROBERT COLLIER.—This goes as far as the Red Lake apparently—as far west as they are now contending for.

Mr. MCCARTHY.—Yes, but your Lordships will see the difference. We say it is limited to that. It starts at the Red Lake, then it goes south of Lake Superior, following the height of land between the Mississippi and the Lakes.

Sir ROBERT COLLIER.—But it goes west as far as they contend for.

The LORD CHANCELLOR.—This cannot possibly be what you are now referring to; at least, when I say it cannot possibly be, I will not undertake to say that, but it seems to be so from the dates. This letter of Colonel Haldimand was dated December, 1762, and what is written at the corner of this map is:

"I hereby certify that this a true and faithful copy made by me of the map enclosed to Mr. Pitt by General Amherst on the 4th of October, 1760."*

That is apparently more than two years before the writing of this letter.

Mr. MCCARTHY.—But General Amherst stated what had been ceded as Canada in 1759.

Lord ABERDARE.—This refers to the negotiations of 1759?

Mr. MCCARTHY.—Yes, the capitulation of Montreal, whereby Canada alone was conceded.

It is curious to look at the Physical Atlas, because the line traced on that map from the Red Lake, as far as it goes, corresponds exactly with the watershed. I am referring now to Johnston's Physical Atlas, showing the water systems of North America. That line from Red Lake is, as far as it goes to the south of Lake Michigan, identical with the watershed of the River Mississippi system and the St. Lawrence system, and therefore was, according to the French contention of those days, the true boundary of Canada or New France.†

*This certificate is from the Foreign Office, and was given for the purposes of the arbitration, in 1878.

†The height of land between the Missouri and the Mississippi formed, in that quarter, the true boundary between Canada and Louisiana. The Country of the Illinois was, at this particular period, within the jurisdiction of the government of Louisiana, and therefore properly excluded from the limits assigned to Canada. (See *ante*, p. 142, note ‡, and p. 169, note * ; Joint App. pp. 603, 644). Haldimand simply deceived himself in delineating any other line in this quarter than that of the Missouri watershed as the boundary; and Vaudreuil did not volunteer to correct an error which would have added so largely to the limits of Louisiana. The language of Haldimand's letter would seem to indicate that the line marked by him, from the source of the Illinois to Red Lake, was not drawn along the watershed of the Mississippi and the lakes, as claimed by counsel, but by or from the River Illinois to the Mississippi, and "up the Mississippi. . .to the Red Lake," (depicted on many maps of the time—of course erroneously—as the source, or one of the sources, of that river), and that the sketch produced is, therefore, something quite different from that referred to by Haldimand. As to the other line, commencing at the junction of the Ohio and the Mississippi, and in regard to which there is no question, Haldimand's tracing passed up the Ohio to the Wabash, and up the Wabash to or towards its source, and thence to the other point of commencement, at the source of the Illinois—the two separate lines thus forming one continuous line, with the effect of excluding from Canada, to the east of the Mississippi, that tract of country only which lies between the Wabash and Illinois rivers. A more literal translation of this part of Haldimand's letter, together with the French original, are appended:—

"Having found M. de Vaudreuil, with several members of his household, in the room that overlooks the street, without other preamble I begged that he would be pleased to point out to me what were the limits of Canada, and conducting him towards the table which was at the end of the room, I opened the map [viz., a large MS. map of North America], and after examining it a little while, I repeated my request. He seemed very much surprised, and as he did not answer me, I passed my finger over the river of the Illinois, saying to him, here is the Illinois [country]. Then he replied that the Illinois [country] had been in contestation between the two governors, but that it had been decided it should remain with the governor of Louisiana, upon which, taking a pencil from my pocket, and resting my elbow upon the map, M. de Vaudreuil standing beside me, I asked him, pointing to the north of the Mississippi, if the line passed that way, and he having answered that it did, I marked dots from the source of the Illinois, going up the Mississippi, and having asked him once again if I marked correctly, he gave me for answer these exact words, (he, the Marquis de Vaudreuil, having his eyes fixed upon the map)—*Take all the north; take all the north.* Then I dotted up to the Red Lake, which seemed to me the most natural limit, without his making the slightest objection. Afterwards, returning on the other side of the Illinois, and not

The LORD CHANCELLOR.—It seems to me to be absolutely impossible that this can be the tracing to which Colonel Haldimand refers. Colonel Haldimand speaks of this in this way: "I marked the points from the source of the Illinois, returning up the Mississippi." That would go down the Illinois to its junction with the Mississippi, would it not?

Mr. MCCARTHY.—No, my Lord He took a turn to the mouth of the Illinois.

Lord ABERDARE.—The source of the Illinois is near Lake Michigan.

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—That appears to be his line up to that particular point, so far as this southern portion of Canada which is now in the United States is concerned, but it does not seem to settle anything as to the north.

Mr. MCCARTHY.—No; I am only using it for the purpose of shewing that the construction we place on the Quebec Act is the true one. My argument is this, that it never was contemplated to take any more than what had been French Canada to make a French province of it by the Quebec Act.*

Lord ABERDARE.—Then you carry French Canada as far as the Red Lake, on the north-west.

Mr. MCCARTHY.—French Canada appears to me to have been, at that date, all the territory drained by the St. Lawrence.†

Lord ABERDARE.—North of that was the Hudson's Bay land, or the Indian land?

Mr. MCCARTHY.—Yes: we say that draining into Hudson's Bay was Hudson's Bay land. That not draining into Hudson's Bay was undiscovered land, and was

imagining that the Ohio could be admitted to be even debatable. I said to him, Here, unquestionably, we take up the mouth of the Wabache; and placing my pencil at the confluence of the Ohio with the Mississippi, I traced a line, going up this first river and the Wabache, which went to meet the point that I had commenced with at the source of the Illinois."

[Ayant trouvé M. de Vaudreuil dans son cabinet qui donne sur la rue, avec quelques personnes de sa maison, je le priay sans autre préambule de vouloir bien me montrer quelles étaient les Limittes du Canada et le conduisant vers la table qui était au fond du Cabinet, j'ouvris la Carte et aprés l'avoir un peu examinée, je réiteray ma demande; il me parut fort surpris; et come il ne me répondait point, je pasay le doigt sur la rivière des Illinois en lui disant, Voicy les Illinois, alors il me repondit que les Illinois avaient été en contestation entre les deux Gouverneurs, mais qu'il avoit été descidé qu'ils dependroient de celui de la Louisianne, sur quoy sortant un crayon de ma poche et m'accoudant sur la Carte, M. de Vaudreuil se tenant debout auprès de moy, je lui demanday en lui montrant le nord du Micésépy si la ligne passait par là, et m'ayant repondu que oui, je marquay de points depuis la source des Illinois en remontant le Micésépy, et lui ayant demandé encore une foi si je marquois bien, il me répondit ces propres pâroles, (lui Monsr. le Marquis de Vaudreuil ayant les yeux fixés sur la Carte)—*prenes tout le nord, prenes tout le nord*, allors je pointay jusques au Lac Rouge qui me parut la borne la plus naturelle, sans qu'il y eut la moindre objection de sa part, ensuitte revenant de l'autre cotté des Illinois; et ne me figurant pas que Loio put seulement etre mise en conteste, je lui dis, icy nous prenons sans doutte par l'embouchure du Wabache, et posant mon crayon au confluant de Loio avec le Micesépy, je tracay une ligne en remontant cette première rivière et l'Wabache qui alloit joindre la pointe que j'avois commencé à la source des Illinois.]

*The Quebec Act, 1774, dealt not with the country surrendered by M. de Vaudreuil in 1759 simply, but with "a very large extent of country within which there are several colonies and settlements of the subjects of France," part of "certain countries, territories and islands in America ceded to His Majesty by the definitive treaty of peace," of 1763, and the name "Canada" is not mentioned in it except in connection with the sedentary fisheries in the Gulf of St Lawrence. (Preamble of the Act.) This cession covered all the French possessions to the east of the Mississippi (and of the lakes Maurepas and Pontchartrain) from its source to the sea, (Treaty, art. vii), and embraced the country of the Illinois, then a dependency of Louisiana, and as such excluded from the capitulation of 1759. Then, the Act carries the southerly boundary of the Province of Quebec "along the bank of the said river [Ohio] westward to the banks of the Mississippi." If from the point thus reached—viz., the confluence of the Ohio and Mississippi—the "northward" line of the Act follows the banks of the last named river to its source, as claimed by Ontario, the whole of the country of the Illinois is thrown into Quebec; if the "northward" line is a due north one, as claimed by the learned counsel, even then by far the largest part of the territory—though but a small fraction of the population—of the Illinois is thrown into the Province. In either point of view, therefore, the province was to include something that was not part of French Canada; and this is rendered still more clear by the statements of ministers and others in Parliament during the debate on the Bill. (Joint App., pp. 367 *et seq.*)

†The constant claim of the French was that their Canada extended northward to the Arctic Circle, or the Frozen Ocean, or—by a suggestion of restriction under the Treaty of Breda—to the 60th parallel; and westward to the South Sea. They had a chain of forts—combined military and trading posts—extending from Lake Superior to the base of the Rocky Mountains. (See appendix B hereto.)

afterwards known as Indian territory; but it is a striking confirmation of the theory that was then put forward, that this line is, as far as it goes to the south of Lake Michigan, the water limit of the St. Lawrence system. Now, your Lordships will see the line goes, if I remember correctly, along the Wabash to the Ohio, and then follows the Ohio down till it meets the Mississippi; and it may be asked, and properly asked, what was the necessity of going as far south as the junction between these two rivers, and marking that out as Canada. The answer is this, and that is shewn upon the map before your Lordships, that south of the lakes, Lake Michigan and Lake Erie, there was a disputed territory between the French and the English. They both claimed that territory. The settlements at that time had not passed the height of land, the Alleghany range; and beyond the height of land—between that and the Ohio—there was a disputed ground, claimed both by the French and the English. Therefore, at this time it was insisted that they should give up all the parts north of the English settlements, including the portion claimed by the English north of the Ohio; and it also explains the word "dependencies" which is afterwards mentioned in the treaty *.

Lord ABERDARE.—May not all this dispute have reference, not so much to the discussion between Canada and the Hudson's Bay Company as between Canada and Louisiana?

Mr. MCCARTHY.—No, my Lord, I will point out further that it was not so, by the correspondence that took place, up to a certain date. Your Lordships will see the point that was settled after the cession, was this: The French were claiming that the proper boundary was the lakes. The English were insisting that the line marked by Colonel Haldimand was the line; and it was not until a year before the treaty was signed that this question was apparently settled.

The LORD CHANCELLOR.—That cannot possibly be the case. This is a controversy between the French and the English, and supposing that to signify the line of boundary at that time, the marquis, having his eyes fixed upon the map, said, "Take all the north," which must mean all to the north of that line; and it would bring you to the waters of the Mississippi.

Mr. MCCARTHY.—Pardon me: if your Lordship reads what follows, that is not the meaning of the words: "Then I pointed to Red Lake, which seemed to me the natural limit, without his making the slightest objection;" which would seem to include that in the expression, "Take all the north."

The LORD CHANCELLOR.—No, I think not.

Mr. MCCARTHY.—Yes, my Lord. That having been said to Colonel Haldimand he puts his pencil on Red Lake, as if to say, May I go as far as that? "Then I pointed to Red Lake, which seemed to me the natural limit, without his making the slightest objection."

The LORD CHANCELLOR.—We must understand what it is. The statement in the letter is that a certain tracing was made, and which I assume to have been that which you produce from the Foreign Office, and the Frenchman looking at it said: "Take all the north; take all the north," at which time nothing had been said about Red Lake; and can it mean anything but what is north of that line?

Mr. MCCARTHY.—That line had not then been traced.

The LORD CHANCELLOR.—Yes, it had, up to the source of the Illinois, and returning up the Mississippi. I thought you explained that that meant that he pointed towards the source of the Illinois, and then he did not go back to the

* This is not apparent on the evidence. A reference to the treaty shews that the term occurs in that instrument, in different connections, several times, and is used in the sense of embracing all the parts of or appertaining to the particular country: "Acadia . . with all its dependencies," "Canada, with all its dependencies," "Florida [etc.], and . . everything that depends on" it.

main current of the Mississippi, but he followed at a distance the course of the Mississippi, along the watershed, so as to draw his line on the watershed dividing the waters which fell into the St. Lawrence system from the waters which fell into the Mississippi system.

Mr. McCarthy.—That is what I cannot see now by looking at the map. I do not mean that map [*the Ontario boundary map of 1884*], but the map [*the Foreign Office map*] which is before your Lordships.

The Lord Chancellor.—But I want to understand this to which you refer. To me it seems that, "Take all the north, take all the north," means all that is north of that line, beyond the Illinois, so to go to England, and all that is south of it to France; and it is evident that the treaty did not proceed on that footing.

Mr. McCarthy.—Quite so. The treaty proceeded on quite different considerations. I am speaking now about Canada. Now, if your Lordships will look at the map before you, you will find where the source of the Illinois is. It is the southern part of Lake Michigan. That is the first thing. He says:

"Here is the Illinois. Then he replied that the Illinois had been contested by the two governors, but that it had been decided they should belong to Louisiana, upon which I took a pencil out of my pocket and resting my elbows on the map, while M. de Vaudreuil stood beside me, I asked him, shewing him the north of the Mississippi, if the line passed that. And he having said, Yes, I marked the points from the source of the Illinois, returning up the Mississippi, and asking him once again if I marked correctly, he answered me in these words (he M. le Marquis de Vaudreuil having his eyes fixed upon the map), 'Take all the north, take all the north.' Then I pointed to Red Lake"—

that is, having been told about the Red Lake, he points to the Red Lake, which is a tremendous distance north of the source of the Illinois—

—"which seemed to me the natural limit, without his making the slightest objection, after which I returned on the other side of the Illinois, and not fancying that Loio could even be contested, I said to him, Here we undoubtedly take the mouth of the Wabache."

The Lord Chancellor.—That means naturally to the west, because the tracing is continued.

Mr. McCarthy.—No, my Lord, he is speaking of the Ohio, which he says could not even be contested. "After which I returned on the other side of the Illinois, and not fancying that Loio could even be contested"— the Ohio is of course a long way to the south-east of the point that he was at, enormously to the south-east; then he says, "I said to him, Here we undoubtedly take the mouth of the Wabache, and putting my pencil on the confluence of the Loio and the Mississippi,"—up to this time he had made no tracing:* he had put his pencil on the Illinois, then on the Red Lake, and now he takes his pencil and traces: and where does he start from? —"And putting my pencil on the confluence of the Loio and the Mississippi, I traced a line again coming up this first river"— that is the Ohio—"and the Wabache,"—he goes up the Ohio until he strikes the Wabache—"and joining the point where I had commenced, at the source of the Illinois." If, your Lordships, we follow up the Ohio and Wabache, then the Wabache to its source, then joining the point at the Illinois, you will have that line exactly, as far as that goes. Then what follows afterwards shews quite clearly, as I venture to submit, that that is so: "This line through its different

*As regards the section between Red Lake and the source of the Illinois, if no tracing had been made up to this time, Haldimand's letter shews that it was not made afterwards, the subsequent tracing extending from the mouth of the Ohio, up the Wabash, and from the Wabash to the source of the Illinois, only. See *ante*, p. 174, note †.

windings, though made off-hand, still gave him plenty of time," and so on. The rest I have read and I need not repeat it.

Then the subsequent correspondence, I think, plainly indicates that. If your Lordships will turn to page 521, you will find that that is the French view, at line 26:

"Thirdly, That the limits of Canada, with regard to Louisiana, shall be clearly and firmly established, as well as those of Louisiana and Virginia, in such manner that after the execution of peace there may be no more difficulties between the two nations on the interpretation of the limits relative to Canada or the other possessions of England."

Then if you will follow that to the next page—at the foot of the next page—the British answer is given.

"His Britannic Majesty will never recede from the entire and total cession, on the part of France, without any new limits, or any exception whatever, of all Canada, with its appurtenances, and His Majesty will never relax with regard to the full and complete cession on the part of France, of the Isle of Cape Breton,"

and so on. I need not follow that further. Then at page 523:

"With respect to fixing the limits of Louisiana with regard to Canada, or the English possessions situate on the Ohio, as also on the side of Virginia, it never can be allowed that whatever does not belong to Canada shall appertain to Louisiana, nor that the boundaries of the last province shall extend to Virginia, or to the British possessions on the borders of the Ohio; the nations and countries which lie intermediate, and which form the true barriers between the aforesaid provinces, not being proper on any account to be directly or by necessary consequence ceded to France, even admitting them to be included in the limits of Louisiana."

To that statement the French replied in the next document, and if your Lordship will look at paragraph 1, you will see:

"The King consents to cede Canada to England in the most extensive form, as specified in the Memorial of Propositions, but His Majesty will not recede from the conditions which he has annexed to the said Memorial relative to the Catholic Religion, and to the power, facility and liberty of emigration for the ancient subjects of the King,"

and so on. That is all appertaining to this point. Then paragraph 2 is:

"The King has in no part of his Memorial of Propositions affirmed that all which did not belong to Canada appertained to Louisiana; it is even difficult to conceive such an assertion could be advanced. France on the contrary demands that the intermediate nations between Canada and Louisiana, as also between Virginia and Louisiana, shall be considered as neutral nations, independent of the sovereignty of the two crowns, and serve as a barrier between them. If the English Minister would have attended to the instructions of M. Bussy on this subject, he would have seen that France agreed with England as to this proposition."

Then Mr. Pitt gave an indignant answer, about the interference between England and other nations, which need not be read with reference to this point. I go on then to page 524, where the British Minister delivers an ultimatum to France:

"Article 1.—The King will not desert his claim to the entire and total cession of all Canada, and its dependencies, without any limits or exceptions whatever, and likewise insists on the complete cession of the Island of Cape Breton, and of other islands in the Gulf and River St. Lawrence. Canada, according to the lines of its limits traced by the Marquis de Vaudreuil himself, when that governor surrendered the said province, by capitulation, to the British general, Sir J. Amherst, comprehends, on one side, the Lakes

Huron, Michigan and Superior, and the said line drawn to Red Lake"—that is, it takes in the watershed of those three lakes—"takes in, by a serpentine progress, the River Ouabachi, as far as its junction with the Ohio, and from thence extends itself along the latter river, as far, inclusively, as its influx into the Mississippi."

The LORD CHANCELLOR.—But then that cannot be the line here, because this line is prolonged to the confluence between the Ohio and Mississippi.

Mr. MCCARTHY.—So it is, my Lord.

Lord ABERDARE.—These are discussions in 1761, three years before the final treaty.

Mr. MCCARTHY.—Yes, my Lord.

The LORD CHANCELLOR.—These documents represent some conferences which took place in 1759?

Mr. MCCARTHY.—Yes, or rather subsequent to 1759.

The LORD CHANCELLOR.—I thought you said they were in 1759.

Mr. MCCARTHY.—The capitulation was in 1759, and then from 1759 to 1763 they were endeavouring to make the treaty.

The LORD CHANCELLOR.—This document was sent by General Amherst to Mr. Pitt in October, 1760. You were, I thought, suggesting that it originated in conversations which were held in 1759. That may be possibly right.

Mr. MCCARTHY.—So I do, my Lord.

The LORD CHANCELLOR.—Then, that being so, I point out that the tracing referred to in this letter to Mr. Stanley, at page 524, cannot be the same, because that represents the River Wabash as taken into what was to be ceded to Great Britain, as far as its junction with the Ohio.

Mr. MCCARTHY.—So it does, my Lord, exactly. That is the course which is marked on that map.

The LORD CHANCELLOR.—Yes, I see. The Wabash is a separate name, and then the Ohio comes in.

Mr. MCCARTHY.—Yes. Then, my Lord, it follows down, you see, to the confluence of the Ohio and the Mississippi. Well, the only object of that was to settle this question as to what it was which is called upon the map [*the Ontario boundary map of 1884*] "Territory claimed by both England and France prior to the surrender of Canada," marked on the map before your Lordships. It was in order to settle that dispute. Then, Article 2 is:

"As to what respects the line to be drawn from Rio Perdido, as contained in the note remitted by M. Bussy, of the 18th of this month, with regard to the limits of Louisiana, His Majesty is obliged to reject so unexpected a proposition as by no means admissible, in two respects."

Now I should like to point out that that proposition of the French, has as many of these things have, a two-fold bearing.

The LORD CHANCELLOR.—At this time, as I understand it, it was not proposed to cede *ad medium filum*—to the Mississippi.

Mr. MCCARTHY.—No. If your Lordships will look at page 43 of the Joint Appendix, you will see the proposition made, to which the answer I am about to read is given—at line 33 or thereabouts.

Mr. MOWAT.—That is in your Case.

Mr. MCCARTHY.—Yes it is, but it is a correct quotation. We have copied it into the Case in full. This is the proposition to which the reply was made on the other page, which I will read in a moment:

"To fix the limits of Louisiana towards the English colonies and Canada, a line should be drawn which will extend from Rio Perdido, between the Bay of Mobile and that of

Pensacola, passing by Fort Toulouse in the Alibamous, and which being prolonged by the western point of Lake Erie, will enclose the River of the Miamis, and by the eastern extremity of Lake Huron will go and meet the high lands on the side of Hudson's Bay."

This is the French proposition.

Sir Robert Collier.—That is the French proposition, to go and meet the high lands on the side of Hudson's Bay.

Mr. McCarthy.—Yes.

Sir Robert Collier.—Then you will observe that is answered by us at page 524.

Mr. McCarthy.—Yes, I am going to read the answer in a moment. The French were claiming that that should be the limit of Canada.

The Lord Chancellor.—This is the same passage which you read just now.

Mr. McCarthy.—No, I have not read this before. It is not the same.

The Lord Chancellor.—It follows it, I think, exactly. It seems to be the same passage which you read just now, on page 524.

Sir Robert Collier.—It is a little further down:

"Because the said line"—that is the line now spoken of—"under colour of fixing the limits of Louisiana, annexes vast countries to that province, which, with the commanding posts and forts, the Marquis de Vaudreuil has, by the most solemn capitulation, incontestably yielded into the possession of His Britannic Majesty, under the description of Canada."

We contended for all that came under the description of Canada.

Mr. McCarthy.—Yes, if I make myself clear to your Lordships, we were then contending for the line marked on the sketch before your Lordships, and they were contending for a line passing through the Lakes.

The Lord Chancellor.—A great deal to the east.

Mr. McCarthy.—Yes, my Lord, between Lake Huron and Lake Superior, at what is known as Sault Ste. Marie, and then to the height of land. I ask your Lordships to bear that in mind, because there the French themselves spoke of the height of land as the terminal point of the line which they desired at that date.

Sir Robert Collier.—They say that they wanted Louisiana as large as it could be, and Canada as small as it could be, but we do not agree to their view.

Mr. McCarthy.—But we agreed to its definitely ending at Red Lake* at that time no doubt. Then I will follow on the correspondence, which shews plainly that, up to a certain point.

Lord Aberdare.—You argued for all these contentions as a proof of what the actual limits were, whereas are not they rather a proof of what they wished to secure, and what they wished not to cede?

Mr. McCarthy.—No, my Lord. For my part, I am willing to concede that in this controversy the English claim was right, and that the watershed line was the true limit of Canada. What the French were trying to do, as it appears to me very clearly, at that time, was exactly what the British ministry accused them of attempting to do, namely, unfairly to cut down what had been ceded at Montreal.

The Lord Chancellor.—That was settled afterwards.

Mr. McCarthy.—That was settled afterwards—after the cession to Spain.

The Lord Chancellor.—Then it strikes me that these previous communications can have but very little bearing upon the construction of the Quebec Act,

*Taking the Haldimand letter, Red Lake, as the supposed source of the Mississippi, was treated as the northerly point of the assumed line of division between Canada and Louisiana. Then, the vast territories to the northward of that parallel, or of the northern watershed of the Missouri—whose southern boundary ran westward conterminously with the northern boundary of Louisiana as far as the Rocky Mountains—was claimed, and held, by France as a part of the Government of Canada.

because that was passed after the English Crown had acquired up to the Mississippi,* which at the time of these communications it was not contemplated that it would do.†

Mr. McCarthy.—There is no doubt, my Lord, that I have to meet that point, and I propose to do it. My only object, so far, is, with all deference to your Lordships, and it does appear to me to be important, to shew where New France ended, because it was never contended—it was not contended by either of my learned friends—that beyond New France the Province of Quebec went.‡ It was to continue to the French people their French rights. I have to meet some of the points which of course naturally suggest themselves as to that point.

The Lord Chancellor.—It would seem pretty clear that Canada, as defined by this map, would have included the whole of the country which has been awarded to Ontario by the award, so far as it is bounded to the south by the present United States territory.

Mr. McCarthy.—No, my Lord.

The Lord Chancellor.—Red Lake is to the west.

Mr. McCarthy.—Yes, my Lord, it goes as far north, but what we say is that Canada did not go further north than to Red Lake.

The Lord Chancellor.—There is nothing whatever in these letters, or in these documents, which suggest it; I should say rather the reverse. The word Canada is written there [*pointing on the tracing*], and I should imagine that everything to the north is Canada, till you get to something beyond Canada.

Lord Aberdare.—That discussion seems to have been as to the line of limitation between Louisiana and Canada.

The Lord Chancellor.—Or at all events, as between the territories of France and England, as then contemplated. It appears to me evident that this tracing is drawn on the principle of following the watershed; but it ascribes to Canada everything to the north, including anything that is now in dispute on the southern boundary.

Mr. McCarthy.—Perhaps if your Lordships would allow me to deal with a very celebrated gentleman's opinion at this stage of the case, it would assist your Lordships. I refer to Sir Travers Twiss, who has had a good deal to do with these matters, and who speaks of that question.

Sir Robert Collier.—I do not think you can read that usefully to us.

The Lord Chancellor.—You can only read it as a part of your argument.

Mr. McCarthy.—Yes, that is all I propose to do, but he puts it far better than I can hope to do. It is at pages 210 and 211 of his book on the Oregon question. "This last lake," he is speaking of Lake Travers which is pretty much in the same neighbourhood as the Red Lake, "this last lake would have been the extreme southern limit, in about 45° 40'."

Lord Aberdare.—But the southern limits of what?

Mr. McCarthy.—He is now speaking of this particular part of Hudson's Bay.

Sir Robert Collier.—Is this an opinion?

Mr. McCarthy.—Yes, a discussion and opinion given on this question.

The Lord Chancellor.—I am not sure that we ought to allow it to be referred to, because it is only an argument.

Mr. McCarthy.—He gives his reasons for it.

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*See *ante*, p. 175, note*.

†If England adhered to the Haldimand view of the capitulation, it appears to have been in contemplation to acquire up to the Mississippi, from the Illinois northwards. See *ante*, p. 174, note†.

‡In this counsel is under a misapprehension, for the contention on behalf of Ontario was, clearly, that the Province of Quebec embraced certain territories excluded from the capitulation of Montreal, but ceded under the Treaty of 1763. See *ante*, p. 175, note*.

The Lord Chancellor.—You may give your reasons for any conclusions which you wish to submit. I think on the whole we had better know nothing of Sir T. Twiss' opinions.

Sir Montague Smith.—If they are good arguments, you may use them.

Mr. McCarthy.—I thought perhaps the argument would come with very much more force from a gentleman like Sir T. Twiss, who knows more about international questions than I do. But the effect of the contention is this, that this was the northern boundary of New France, and the southern boundary of the Hudson's Bay territory, or what was English then. Certainly, the claim made by the English in those days was to what was comprised in the charter granted to the Hudson's Bay Company, and the effect of that would be to carry it to a line between the Hudson's Bay waters and the St. Lawrence system. Now, following that on, this discussion appears to have not ended in anything. When the discussion ends, we do not find that the English obtained the consent of the French to the acceptance of their views; nor, on the other hand, do we find that the French induced the English to waive their claim. Then there is a certain lapse, and the negotiations cannot be procured. In the end, we find the treaty, ceding Canada and its dependencies, and, for the purpose of fixing a limitary line, not merely for this country but for the whole continent, they take the line of the Mississippi. We do not say by that, nor did France say by that treaty, therefore the line of the Mississippi is the westerly limit of New France. All France says is: We give up all claim (having already ceded on the west side to Spain, and practically having no claim left) which we might have made to the intermediate country which was in dispute between us.*

Now comes the Quebec Act. That Act has been read already once or twice, but perhaps it will be convenient if I give your Lordships the page: page 366 is where it is to be found. Now the contention which I advance is, following to a certain extent the argument of my learned friends on the other side, that the intention was, by this Quebec Act, to take in what had been the province or country of New France or Canada, and I agree also with my learned friend who last addressed your Lordships, that those were equivalent or interchangeable terms. The boundary then goes down to the very point marked upon this sketch: to the confluence of the Ohio and Mississippi Rivers. That very point marked on the sketch which I handed up to your Lordships, is the south-western extremity of the line marked down by the Act. The difficulty arises in finding out what the western limit was. My contention is, that from that definite point the Act of Parliament says, a line due north to the Hudson's Bay territories—not due north but northwards.

Lord Aberdare.—First of all it says: "along the bank of the said river."

Mr. McCarthy.—Yes, first of all, "along the bank of the" Ohio.

Lord Aberdare.—"To the banks of the Mississippi."

Mr. McCarthy.—"To the banks of the Mississippi."

Lord Aberdare.—"And northward, along the banks of the Mississippi," we must take it to be.

Mr. McCarthy.—No; that is just where the difference comes in.

Lord Aberdare.—That is clear, I should think, beyond controversy, in the commission to Sir Guy Carleton, which is a contemporaneous document, and must shew how this was acted upon.

* There was no question of any intermediate country in dispute between them which in any way touched the tract, between the due north line and the line of the Mississippi, in controversy on the present reference.

Mr. McCarthy.—Undoubtedly.

The Lord Chancellor.—And surely if there were sufficient ambiguity about it to admit of that construction, you cannot escape from the conclusion that they were rightly construed.

Lord Aberdare.—How was this construed immediately afterwards in the descriptions given in the commissions, when everything was fresh?

Mr. McCarthy.—I will say a word about that presently. My present contention is this, that if the Act of Parliament is plain and unambiguous, having learned the geography of the country, and having ascertained where these French settlements and colonies were, that is all that we are entitled to know in reading the Act of Parliament. You are bound to know and to take judicial cognizance of the geographical position of, and where all the colonies and settlements of New France referred to in the recital were. But having known that, then I take it that we have got to look within the four corners of the Act of Parliament, and if there is no ambiguity in the expression then I submit that that Act of Parliament must govern the question.

The Lord Chancellor.—Of course you are quite right, if there is no ambiguity in the expressions: nothing which can reasonably bear more than the sense which you seek to impose upon it. That is the general rule undoubtedly; but can that possibly be maintained here?

Mr. McCarthy.—That is what I am going to endeavour to argue before your Lordships.

The Lord Chancellor.—You will observe, it is not to the confluence of the two streams, but "to the banks of the Mississippi."

Mr. McCarthy.—Now, the first point which presents any ambiguity is, that in the earlier part of the statute it has been precise in following the bank of the Ohio.

The Lord Chancellor.—Yes, that is so in several places, and perhaps that has a bearing against you, as it appears to me.

Mr. McCarthy.—I thought it was the other way. I submit, with all deference, it has the other bearing, because, when they intended it to follow the bank of the stream, we have here the legislature speaking in unmistakeable language, but when they come to this point, if the construction of the other side is the correct one, we see no explanation of why it should not have said "following the bank of the Mississippi."

Lord Aberdare.—It does not say bank of the Mississippi, but "banks of the Mississippi," as if it meant the whole of the entire banks of the river.

The Lord Chancellor.—You read "the bank" as if it was the point of confluence.

Mr. McCarthy.—Yes, your Lordships will see at that time it was only one bank that the English had.

Lord Aberdare.—It is only one bank of the Mississippi that they claimed. They had only talked about the bank hitherto, but when they speak about the Mississippi they speak of the banks.

Mr. McCarthy.—They could not have meant the banks, because that would have involved crossing the stream, and they have no right to cross the stream.

Lord Aberdare.—No, they cannot have meant that, and therefore there must be another interpretation, and the other interpretation is that it means the continuous bank of the whole river.

Mr. McCarthy.—The British legislature is only legislating with regard to the British line, not with regard to the other bank which is the French line.

That word "banks" is either a clerical error, or it can only be construed as being the bank *.

Sir MONTAGUE SMITH.—You mean that the insertion of the word is a clerical error?

Mr. MCCARTHY.—Yes, possibly.

Sir MONTAGUE SMITH.—You construe "northward" to be "due north?"

Mr. MCCARTHY.—Yes.

Sir MONTAGUE SMITH.—Is it not capable of two meanings, due north or northerly?

Sir ROBERT COLLIER.—The Chief Justice declared that "northward" meant the same as "due north."

Mr. MCCARTHY.—If the word was "due north" there would be no room for doubt.

Sir MONTAGUE SMITH.—"Northward" may mean due north, or in a northerly direction. Then is there not an ambiguity to be got over?

Mr. MCCARTHY.—Not an ambiguity with regard to the meaning of the word, but with regard to the lie of the ground.

Sir MONTAGUE SMITH.—There is a latent ambiguity.

Sir ROBERT COLLIER.—Supposing it had said, "along the bank of the said river westward to the banks of the Mississippi, and following those banks northward to the southern boundary of the territory"—you can hardly deny that it is capable of being so read.

Mr. MCCARTHY.—That is my contention; and I will point out to your Lordship the difficulties which I see in applying the construction which your Lordship has just suggested. The sources of the Mississippi were not then known, but on this map of Mitchell's the source of the Mississippi is supposed to be in latitude 50, longitude 106. Now I will ask your Lordships to look at that on the map.

Sir ROBERT COLLIER.—That would take it above the Lake of the Woods.

Mr. MCCARTHY.—Here is a note on the map which I will read:

"The head of the Mississippi is not yet known. It is supposed to arise about the 50th degree of latitude, and western bounds of this map, beyond which North America extends nigh as far westward as it does to the eastward by all accounts."

Sir ROBERT COLLIER.—It will take it to the Lake of the Woods.

Mr. MCCARTHY.—That is where they are supposed to be. I am going to point out that I doubt very much whether in those days that would be a reasonable construction. I am pointing out what appears to me to be the difficulties in following the Mississippi, because of course the legislature did not stop short in its definition where the Mississippi was known. If that was the proper construction, the Mississippi must be followed up to its sources, and from those sources to the Hudson's Bay territory. On this map it is marked as on the line of 50°, and as far west as 106°.

Sir ROBERT COLLIER.—What map are you on now?

Mr. MCCARTHY.—I am on Mitchell's map. I have read that from Mitchell's map. If your Lordship will look on that, you will see where that point is. What it says upon Mitchell's map is this: "The head of the Mississippi is not yet known. It is supposed to arise about the 50th degree of latitude, and western bounds of

* Ontario shewed that the word "banks" was in the original bill, and had reference therein to the extension of the whole territory of Quebec "westward to the banks of the Mississippi." See *ante*, p. 42, note; *post*, p. 186, note†. But even taking the term "westward" as applicable to the prolongation of a line, the word "banks" would be susceptible, not only of the interpretation put upon it by Lord Aberdare, but also of that furnished by the fact, pointed out further on, that the navigation of the river, "in its whole breadth and length," was, under the Treaty of 1763, made free to the subjects of Great Britain, the British interest extending thus to both the easterly and the westerly bank.

this map." The western bounds of this map go to near 106°. That was in 1755; the Act of Parliament was in 1774.

The LORD CHANCELLOR.—Very probably, some such idea was in the minds of those who drew this Act of Parliament, because, if you are going along the banks of the Mississippi northwards to the southern boundary, that would be perfectly accurate if the Mississippi rises within the Hudson's Bay territory.

Mr. MCCARTHY.—What strikes me, my Lord, if I may be permitted to say so, about that, is this: If your Lordship will look at the map at that particular point, it is quite evident, I think, that at that date the Hudson's Bay territory could hardly be known to extend so far. Mitchell's map, which has been referred to for other matters, would seem to shew Hudson's Bay did not go as far west as that territory under the charter. I think the line on Mitchell's map is the line that went to Split Lake, and if it went to Split Lake, this is several degrees west of Split Lake. The height of land boundary on Mitchell's map is the height of land which goes to Split Lake.

Lord ABERDARE.—You would argue that when they used the words "the head of the Mississippi," they knew at any rate that the sources of the Mississippi must be on the other side of the height of land.

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—Then, you find it rather more to the south than you expected?

Mr. MCCARTHY.—Yes, and a good deal more to the east.

Lord ABERDARE.—According to you, you must not take it up to the 50th degree, where they supposed it to go—

Mr. MCCARTHY.—I have not made myself clear.

Lord ABERDARE.—But you must take it to the watershed, and the watershed actually turns out to be very much to the south.

Mr. MCCARTHY.—Yes. I am now speaking only as to the construction of the Act. We must look, in order to find the construction, at the knowledge of that day, and we must deal with it in regard to that knowledge. At that day the source of the Mississippi was unknown, but the supposition was that it went as far to the west as 106°, and as far north as 50°.*

Sir MONTAGUE SMITH.—Where is 106°?

Mr. MCCARTHY.—It is west of the whole thing altogether. It is within a very short distance of the Rocky Mountains. My argument is that parliament would hardly intend to carry the country of Canada west to that point. If we follow that line, that is the conclusion, for two reasons: in the first place, it is going far west, as your Lordship will see, of Red Lake, which is supposed to be the limit of Canada.

Sir ROBERT COLLIER.—Very little to the west.

*It can hardly be maintained that Mitchell's map of 1755 correctly represented the state of the geographical knowledge of 1774, as respects the point under discussion. The Carte de l'Amerique Septentrionale, 1743, by the standard geographer Bellin, in Charlevoix' Histoire de la Nouvelle France, shews the source of the Mississippi in about latitude 47½°, due south of Lac des Bois. In the Mémoires des Commissaires du Roi et de ceux de Sa Majesté Britannique, Paris, 1755-7, is a map, Carte des Pretentions des Anglois dans l'Amerique Septentrionale, on which the Mississippi is shewn as having its source in Lac Rouge, about 2° south of the Lake of the Woods; on Jefferys' Map of Canada and the North Part of Louisiana, contained in his History of the French Dominions in North and South America, London, 1760, an affluent of the Mississippi issues from Red Lake or Missisacaigan, the sources of the main branch being almost due south of the Lake of the Woods; and in his Chart of the Atlantic Ocean, with the British, French and Spanish settlements, (about 1763), the sources of the river bear the same relation to the Lake of the Woods. With this agree three other maps, published in the same year; and Bonne's Partie de l'Amerique Septentrionale, of 1773, shows the sources in nearly their true position in reference to the Lake of the Woods. (Ont. App. 118-121, 123). The French, through their explorers and missionaries, had this knowledge from an early date, but it must be confessed that it was not always correctly represented upon their published maps.

The LORD CHANCELLOR.—You are reading the Act of Parliament by that map. That map is very useful for some purposes, but hardly for that. Though the map may be very useful for some purposes, it hardly can be read into the Act of Parliament.

Mr. MCCARTHY.—What I mean is, if we want to find out what was meant at the time, we must see what the consequence, in the eye of Parliament, would be in following that reading.

The LORD CHANCELLOR.—If you were to follow the banks of the Mississippi, the framers of the Act believed they would be led along these banks till you reached the southern boundary of the Hudson's Bay territory.* More than that it seems to me, you cannot get from it.

Mr. MCCARTHY.—If that is so, it gives to the Hudson's Bay territory very great western extension according to the view of that day. That was the difficulty which appeared to me in taking that construction. Your Lordship will see, the Hudson's Bay Company had not penetrated to that extent westward at that time, and although it may have been known there was a watershed to the Hudson's Bay, still the other side can hardly blow hot and cold. They can hardly say the Mississippi was to be followed, and yet the Hudson's Bay territory could not have been reached by that north line.† Your Lordship will see where the height of land to Split Lake is. I do not know about the English knowledge, but in the French maps the height of land is marked down—and as far as Lake Superior—with marvellous correctness.

The LORD CHANCELLOR.—As far as Lake Superior, likely enough.

Mr. MCCARTHY.—And other maps, to which reference has been made also, shew that there was a height of land, which I have spoken of already, which went to Split Lake. It may be quite possible that was the height of land, at the time, which was supposed to bound the Hudson's Bay territory. If so, it would be absurd to follow the Mississippi up to its source, and north to the Hudson's Bay territory.‡

Sir ROBERT COLLIER.—Nothing at all is said in the Act about north of the height of land.

Mr. MCCARTHY.—Now, my Lord, I will point out very briefly what I have to say with regard to this question, which will be more fully dealt with by my learned friend. I will not go into it in great detail.

The chief settlements—except three or four—were east of the due north line. The French colonies and settlements were at Detriot, Michillimackinac, Sault Ste. Marie, Fort Miamis, Vincennes and other places. Numbers and numbers of them, which will be pointed out more in detail, were all east of this due north line, except three or four settlements upon the Mississippi, planted there at the time Le Sueur ascended the Mississippi. The inhabitants of these, as the histori-

*See, as to the intention of the framers of the Act, p. 42 *ante*, text and note.

†The argument on behalf of Ontario, upon the Quebec Act, relative to this point, was that the word "northward" had reference, not to the prolongation of a line, which the grammatical construction would not admit of, but to the extension, in that direction, of the whole territory dealt with, as shewn by the history of the passage of the Bill through Parliament, as if the Act read: "All the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line . . [and extending] westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay," (see *ante*, p. 42, note, and p. 34, note); that even if this view was not to prevail, the language of the Act did not necessarily require that the Hudson's Bay Company's territory should be met with at the source of the Mississippi; and that, in any event, the line from that ascertained point—whether drawn due north, northward by a natural boundary, or deflected to embrace the French posts of the North-West—must, since, and by force of, the orders in council, proclamation, and statute of 1791, and the subsequent commissions, be so drawn as to reach the "boundary line"—that is "the shore"—of Hudson's Bay.

‡Not at all absurd, for a line drawn due north from the actual source of the Mississippi would intersect this particular height of land at about the sources of the Severn and Berens rivers.

cal accounts of the day prove, very naturally, on the occasion of the treaty being published, abandoned their homes and what had formerly been their country, and went to the west bank of the river and founded the present city of St. Louis.*

Lord ABERDARE.—What importance do you attach to those numerous forts which had been founded to the west of this line?

Mr. MCCARTHY.—That comes in with reference to another point. Those were not, in any sense in which we should understand the term, posts or forts. These gentlemen that are spoken of undoubtedly did go there and establish temporary posts, but there were no settlements. They were really intended to help in the discovery of the Western Sea The mission of these men, sent by France, was to find the Western Sea. They started at Fort William. They would have a fort here and there, as steps on the journey they were making to the Western Sea. I will point that out, and prove it from the correspondence to which my learned friend has referred, but in the sense of their being settlements or colonies the word could not be used. The whole number of men in the posts of the Western Sea, included under one post, are stated as seven in the document referred to, from the Governor of the State of New York.

Sir ROBERT COLLIER.—Seven for how many posts?

Mr. MCCARTHY.—For all these seven or eight posts.†

Sir ROBERT COLLIER.—One man at each post.

Mr. MCCARTHY.—They had been abandoned; they were not posts.‡ When the cession took place, Detroit, Sault Ste. Marie and Michillimackinac were all de-

* All the settlements of the Illinois country—with perhaps one exception, that of a small settlement on the right bank of the Wabash—were to the *west* of the due north line, and, notwithstanding a considerable emigration to the other side of the Mississippi, contained a larger French population at the time of passing the Quebec Act than several of those named in the text combined. (Mills. p. 95.) In 1773, the inhabitants were agitating for a separate form of civil government, as to which Lord Dartmouth, the Secretary of State, wrote: "Some form of government seems essentially necessary; and though I cannot think that a civil establishment independent of any other of the King's colonies ought to be adopted, yet I venture to assure you that the interests of His Majesty's new subjects there will not be neglected." (Joint App. 363.) This promise was fulfilled when their interests were comprehended in the Act of 1774: in 1775, a Lieutenant-Governor of the "Illinois District, in our Province of Quebec" was appointed by Imperial Commission; and under the Royal Instructions to Governor-General Carleton, of the same year, a local court of justice, of inferior civil and criminal jurisdiction, was established, in addition to the courts for the province at large. The Lieutenant-Governor of the Illinois was commanded to obey such orders as he might receive from the Governor-General, and his salary, with the salaries of the local judge, the assistant judge or assessor, and the sheriff, were made chargeable upon the revenues of Quebec. (Joint App. 605-6, 363, 379 81) And besides the settlements of the Illinois, there were also, to the west of the due north line, Prairie du Chien, St. Antoine, and other posts of the Upper Mississippi (Prairie du Chien alone contained a French population of 500 at the time of its surrender), Chagouamigon, Kamanistiquia, and the posts of the North-West.

† Col. de Bougainville, who served in Canada through the war which ended in its capitulation, is the best and unquestioned authority on this subject, and he says of these very forts, that each was trusted, generally, to the care of one or two officers, seven or eight soldiers, and eighty *engages Canadiens*, or about ninety men, making an aggregate force of over six hundred at that date. He shews that this Post of the Western Sea, as the forts of the North-West, with their dependent territory, were collectively called, was held in possession, and for purposes of commerce, but that it was of importance also for two other reasons, viz., that from it the English of Hudson's Bay could be watched, and the discovery of the Western Sea might be accomplished. Of Fort des Prairies on the Upper Saskatchewan, the most remote of the seven forts of the North-West enumerated by him, he says it was farmed to its commandant with a fourth interest in its trade, for a consideration of eight thousand francs, and that besides a large fur trade, it had a considerable traffic in slaves—Rouges or Panis. (See *ante*, p. 94, note.) After the cession of Canada, many of these forts remained in possession of the trading associations which subsequently became united as the North-West Company, and among them Fort des Prairies, which is described in 1776 as having "usually from fifty to eighty men for its defence." (Henry's Travels, quoted in Ontario App. p. 52.)

The misapprehension of counsel was upon the despatch of Governor Carleton—not of the Governor of New York—of 1768, quoted *ante*, pp. 82-4, which had reference to the year 1754: "The annexed return of the French posts, of the troops for the protection of trade, with the number of canoes sent up, in the year 1754, shews," etc. The return—relating and professing to relate to regular troops only—gives one officer, two sergeants, and four soldiers for each fort of the North-West, but makes, of course, no mention of the *engages*, indispensable at every post not exclusively military. (Joint App. 611.)

‡ The evidence is that they were posts, and that they were not abandoned but were held by France until the Conquest. They could not have been abandoned in 1754, the time treated of by Gov. Carleton, (*ante*, pp. 82-4), nor in 1757, when Bougainville wrote, (*ante*, p. 94, note; *supra*, note †), nor in 1761, when Jefferys' account of them was published, (*ante*, pp. 143-4).

livered up to the King, and, after the Treaty, the posts upon the Mississippi; but no one ever heard there was ever a surrender of these so-called posts and forts in what we now call the Hudson's Bay territory. Therefore, if we want to give a meaning to the Act, which of course the recital is entitled to, and we want to find what colonies and settlements were to be brought in, and to which a civil government was to be given, and that a French one, we do find all the settlements belonging properly to France. The other alternative, and of course it is not free from doubt, is to leave these posts upon the Mississippi, such as Caskaskias, Fort de Chartres, Cahokias—these three posts and small settlements about them—without any civil government. The answer which I make to that, with a good deal of confidence, is: Was it intended by the British Parliament that from the Wabash, where Vincennes is, all that intermediate country, which now forms the great state of Illinois, and beyond the great state of Illinois, was to be brought in under the French law and made a French settlement? Of course, all these three or four small settlements which were there were being deserted by the people going to the French side of the river, because although ceded to Spain in 1762, that cession did not become known for three or four years afterwards. That is the proposition on the facts.* Then, if your Lordships will look at the map, I concede that what Sir Montague Smith has said is perfectly true, namely, that "northward" may mean due north, or in a northerly direction. We have to look at what had to be reached. The Hudson's Bay territory had to be reached, and, more especially looking at Mitchell's map, it would be more reasonable to take the Illinois as the north line than the Mississippi. To go by the Mississippi to the junction of the Illinois and follow the Illinois would be a far more reasonable construction in those days of the "northward" line, if the words due north do not apply to it. That would have equally reached the Hudson's Bay territory. It would have reached it in a much more natural course, and would be much less to the north-west than the Mississippi as then understood, or even as it exists, would be

Sir Montague Smith.—Do you contend now for the due north line on this map?

Mr. McCarthy.—Yes. My argument is this. The more difficulty you have as to whether you are to bend to the east or the west in order to get to the Hudson's Bay territory, the more certain it becomes that you must follow the due north line. I say that the map, and its history, and the circumstances I have mentioned, indicate, as I venture to say (with some clearness to your Lordships I trust), that it would be more in accordance with what we can assume to have been in the contemplation of the British Parliament at that time, to have followed the course of the Illinois than it would be to bend to the north-west and follow the course of the Mississippi. What then is left? Is there any other left except the line solemnly determined by the Court of the Queen's Bench, in 1818, as the proper boundary, that is, the due north line? I suppose it would be hardly fair to commit the Chief Justice to the report of the case, which may not be full. This would be a reasonable construction to put upon the language. If it would be a shorter line to take the due north line to Hudson's Bay, that would be a proper reason for following it.

Sir Robert Collier.—The due north line would be the shortest.

Mr. McCarthy.—That is what I contend. It depends upon whether the Hudson's Bay is nearer that point than the other. You might reach the Hudson's Bay on the west line quicker than upon the due north. But for the present, I will leave that part of the subject, and come to what I contend on the second point.

*See *ante*, p. 187, note*.

The LORD CHANCELLOR.- Your second proposition is that this line, which is drawn direct to the confluence of the rivers, simply depends on what is the necessary and right construction of the words of the Quebec Act?

Mr. McCARTHY.—Yes.

The LORD CHANCELLOR.—You have nothing else in favor of it?

Mr. McCARTHY.—All the circumstances I have endeavoured to point out are in favour of it. That is my contention.

The LORD CHANCELLOR.—I do not see it. But except those facts you have already referred to, there is no fact to shew an actual use, or enjoyment, or possession, or occupation, or government, coinciding with that line at any time.

Mr. McCARTHY.—I think there is nothing one way or the other, except that up to the height of land, at Fort William, the Province of Upper Canada extends about 30 or 20 miles west of the line.*

Now my second point is, assuming the construction contended for on the other side is the proper one, and that the Mississippi has to be followed up, we will follow the course of the Mississippi up to Lake Itasca. Then, if I am right in apprehending what has already occurred, it seems to be conceded the only thing to do would be to go direct north to the Hudson's Bay territory.†

The LORD CHANCELLOR.—The Act of Parliament seems to be drawn on the supposition that by following the banks of the Mississippi you would get to the boundary line, and probably cross it. This is a mistake in fact—I suppose, on sound principle, you would then take the next point?

Mr. McCARTHY.—I understand there is no dispute upon that. Then it becomes a most important question in this view to determine where is the southern boundary of the Hudson's Bay territory. Until we know that, we do not know where to stop with the north line. In regard to Hudson's Bay, the charter has been referred to, and I need not read it again. Our reading of the charter is, that the King, who had then, we say, unquestionably, according to history, been the discoverer of Hudson's Bay, and the adjoining territory, had what is known in international law as an inchoate right to preserve that by settlement.‡ To the discoverers of this continent, or part of it, followed by settlement, the country, according to the arrangements made by the European nations, belonged. I will not trouble your Lordship with that, because I know that it is unnecessary. It is hardly necessary in an English court, or for an English counsel, to contend as to that point with all these facts before us, though the French did strenuously urge the other view. At that date, what was the possession of the Crown? It had discovered, but it had not settled. The discovery gave it the right to perfect and complete its title, its acquisition of this new territory by settlement; but peradventure, somebody else—France—might have settled, and so in granting the charter, the King gives to the adventurers, as they were called, the Hudson's Bay, and all the territory draining§ into Hudson's Straits

* There is the further important fact, that in 1775, the year after the passage of the Quebec Act, "the Illinois District, in our Province of Quebec," with "its dependencies," was organized as a Lieutenancy, by Imperial Commission and Royal Instruction, under the jurisdiction of the central government at Quebec, but with a Lieutenant-Governor, local courts of justice, etc. (See *ante*, pp 134, note, and 187, note*). Detroit, Michillimackinac, and other places, admittedly within the limits of Quebec, were respectively similarly organized, the same year.

† See *ante*, p. 186, note †.

‡France claimed, and it was the contention of Ontario, that the circumstances were such that no such right could accrue to England; that the French settled on the St. Lawrence, and founded Quebec, before any of the English voyages relied upon in this connection took place, and proceeding from the St. Lawrence side, were the first discoverers, and first occupants, of the territory, were, from the first, in the enjoyment of its trade and in friendly alliance with its native inhabitants, and, moreover, made a disposition of it, by Charter, some 40 or 50 years before the Charter to the Hudson's Bay Company was granted. See appendix B, hereto.

§ The charter contains no such words.

and Bay, except such portion of that territory as was then actually possessed by any other Christian people; and the question is, was there any actually possessed by any other Christian people at that time. Upon that, also, the facts are hardly in dispute. The French claim that they had been there, but if they had been there they had been there as discoverers, and as their so-called discovery was subsequent to the English, they took nothing by that; they had not settled. Now, there is not a shred of pretence set up in any of the evidence and documents before your Lordships that, at that date, the French were in possession of any portion of territory which we say was granted by that charter to the Hudson's Bay Company.* So that, *prima facie*, and at all events as far as the Crown and people of England are concerned, that charter, of its own strength and force, although not binding upon foreign powers, did give to the Hudson's Bay Company all which on its face it purports to grant. This, I understand, is the difference between the international view and the municipal view, so to speak. Municipally speaking, that did give all it spoke of. It might be that as against a foreign country it only gave what it was in the power of the King to grant, but so far as the municipal law goes, so far as Great Britain is concerned, it did grant all which on its face it purports to grant.†

Now, if I am right in that, that that was the effect of this grant—let us see what followed; and I propose to divide my statement into three or four different periods of time, and to trouble your Lordships as little as possible with references, though I have them all here. My first period of time I have now brought to a close, and that is the date of the charter. The second period of time is from 1671 to 1686 and during that time, but only commencing after 1680, the French were fighting (although peace at that time prevailed) with the English in Hudson's Bay, and in point of fact had captured all their forts but one. They had actually driven the English out of these forts, having come overland from Canada. They had succeeded in driving the English out of their forts, out of their positions, out of their settlements, and they had occupied them, and were then in possession of some of them. But I should have mentioned that during the early part of this period (and it has always been made a strong point in favour of the Hudson's Bay claims) the French acknowledged and acquiesced in the Hudson's Bay possessions. They did not dispute it. So the claim has been put forward on behalf of the Hudson's Bay Company on two grounds, first, discovery and settlement, and secondly, acquiescence by the French,‡ who pretended to be equally

* There is a mass of evidence in the several Appendices, whereon Ontario's contention in favour of an adverse prior title and possession on the part of France is based. This is dealt with more fully *post*; but see appendix B hereto.

†Ontario claimed that either there was no title that could interfere with the paramount title of France; or if it could be held that there had been any sort of title, or semblance of title, on the part of the company, it had been destroyed by the combined effect of the French military successes and the terms of the Treaty of Neutrality and Treaty of Ryswick, and the consequent inability of the company to invoke any right of postliminy; that the after acquirement of the territories by the Crown of Great Britain, as a result of wars and treaties—the treaties of Utrecht and of Paris—could not be held to enure to the benefit of the company, and the Crown, or the Parliament, as the case might be, was free to dispose of them in enlarging the limits of Quebec, or of Upper Canada (as actually happened), or otherwise, as it might deem fit, without regard to any claims of the company. Further, as a matter of argument, even if the Crown had chosen to still recognize in the company a title to the soil, it was competent for it—looking at the question as one of boundary merely—to place the territory within the limits of the Province, and to thus extend to it the provincial laws and government. In this connection it will be remembered that notwithstanding the charter, the Imperial Acts of 1803 and 1821 extended the jurisdiction of the Canadian courts to the admitted territories of the company, the latter Act also providing for the appointment *by the Crown* of justices of the peace within the same territories, and for empowering any such justices, by commission under the Great Seal, "to sit and hold Courts of Record for the trial of criminal offences and misdemeanours, and also for civil causes."

‡ Ontario shewed that there was no valid claim on the ground of either discovery or settlement, and that there was no evidence of such acquiescence. On the contrary, the evidence shewed a total denial of, and armed resistance to, the company's pretensions, by the French. See appendix B hereto.

entitled, and undoubtedly for some years did not disturb, but rather were on good terms with the English—there is some correspondence to shew that—during the time when Bailey was Governor of the Hudson's Bay Company. Not to delay your Lordship I will put in that afterwards. There is a document from the French—a correspondence with the Governor of Hudson's Bay—acquiescing in his possession.* During that period, from 1680 to 1686, I say the English were very much disturbed, and then, in 1686, we have the Treaty of Neutrality, which forms, as it seems to me, the first proper line to stop at. The Treaty of Neutrality is at page 544 of the Joint Appendix. The fourth clause, I think, is the important one.† Then, under that treaty commissioners were appointed, and an attempt was made to ascertain what was the proper line of demarcation between the French settlements in Canada and the Hudson's Bay, and they extended over a period until 1697, or rather they did not go so far as that, because war broke out before that. I think I can give your Lordship the date when that next war broke out. It was 1689—1686 was the Treaty of Neutrality—1689 was the date of the declaration of war. During this short period an attempt was made, as the correspondence which is put in as part of the case shews, to settle the dispute which then existed between the two countries. I will trace it up historically to your Lordships. I do not know that very much really attaches to it.

The LORD CHANCELLOR.—Unless it tends to shew the southern boundary.

Mr. MCCARTHY.—It shews the Hudson's Bay people were claiming what they have all along claimed, namely, that they were entitled to all the territory drained by Hudson's Bay.‡ Then comes the Treaty of Ryswick§ following that. That was in 1697. They were left, to use their own words, "the only mourners by the peace." That did to a certain extent leave them in an uncom-

*See *ante*, p. 190, note‡.

† TREATY OF NEUTRALITY, BETWEEN LOUIS XIV. OF FRANCE AND JAMES II. OF ENGLAND, 1686.

IV. It has been agreed that each of the said Kings shall have and hold the domains, rights and pre-eminences in the seas, straits and other waters of America, and in the same extent which of right belongs to them, and in the same way they enjoy them at present.

‡ It is in evidence that no such claim had then, or for a long period afterwards, been preferred by the company. Chief Justice Draper, in his memorandum of 6th May, 1857, submitted to the Secretary of State for the Colonies, (Joint App., 193), collects the authorities on this point, and adds:

"In all the foregoing documents it will be observed, that whether upon the Peace of Ryswick, when English affairs looked gloomy, and those of France were in the ascendant, or after the Treaty of Utrecht, when the power of France was broken, the Hudson's Bay Company sought to have the boundary between the territories they claimed and those forming part of Canada, settled by some defined and positive line which was to be the result of negotiation, not then pretending that there was anything in their charter which gave them a rule by which they could insist that the extent of their territories to the southward should be ascertained.

"Even in October, 1750, they entertained the same views, while at that time they were pushing their pretensions, both to the northward and westward, to the utmost limits. * * *

"The foregoing extracts are deemed sufficient to establish what the company considered their territorial rights in reference to their connection with and proximity to Hudson's Bay itself, where they had planted their factories, and desired to attract the Indian trade. They certainly shew that neither after the Treaty of Ryswick, nor that of Utrecht, when they stated the boundaries they were either willing to submit to, or were desirous of obtaining, nor yet in 1750, when they set forth what they thought themselves entitled to claim under their charter, did they ever think of asserting a right to all the countries the waters of which flow into Hudson's Bay. * * *

"The French Government, it appears, would not agree to the proposal which would have limited them to the 49th parallel. Colonel Bladen, one of the British Commissioners under the Treaty of Utrecht, wrote from Paris, in 1719, in reference thereto: 'I already see some difficulty in the execution of this affair, there being at least the difference of two degrees between the last French maps and that which the company delivered us.' No settlement of the boundary could be arrived at.

"So far as has been ascertained, the claim to all the country, the waters of which ran into Hudson's Bay, was not advanced until the time [10th June, 1814] that the company took the opinions of the late Sir Samuel Romilly, Messrs. Cruise, Holroyd, Scarlett, and Bell.(1) Without presuming in the slightest degree to question the high authority of the eminent men above named, it may be observed that Sir Arthur Piggott, Sergeant Spankie, Sir Vicary Gibbs, Mr. Bearcroft, and Mr. (now Lord) Brougham, took a widely different view of the legal validity of the charter, as well as regards the indefinite nature of the territorial grant, as in other important particulars."

§ Printed *ante*, p. 112, note.

fortable position. That went to this exent. It has already been referred to by the other side. It specifically stated that the forts that had been taken by the French from the English, even although in time of peace, and were retaken by the English during the ensuing war, should be restored to the French. That part of it is at the top of page 489:

"The Most Christian King shall restore to thesaid King of Great Britain all countries, islands, forts and colonies, wheresoever situated, which the English did possess before the declaration of this present war. And in like manner the King of Great Britain shall restore to the most Christain King all countries, islands, forts and colonies, wheresoever situated, which the French did possess before the declaration of war, and this restitution shall be made on both sides within the space of six months, or sooner if it can be done. And to that end, immediately after the ratification of this treaty, each of the said Kings shall deliver, or cause to be delivered, to the other, or to commissioners authorized in his name for that purpose, all acts of concession, instruments and necessary orders duly made and in proper form, so that they may have their effect.

"Commissioners shall be appointed on both sides to examine and determine the rights and pretensions which either of the said Kings hath to the places situated in Hudson's Bay; but the possession of those places which were taken by the French during the peace that preceded this present war, and were retaken by the English during this war, shall be left to the French by virtue of the foregoing articles."

That, I think, is all. "The capitulation made by the English on the 5th September, 1695, shall be observed according to its form and tenor." That, I do not think applies to this point. Then, the Hudson's Bay Company were exceedingly dissatisfied with this condition of affairs, but fortunately for them, this treaty, I think, never was carried out. These forts never were actually delivered up.* They continued in that way, the Hudson's Bay Company representing to their government that all that was intended to be given up were the forts, that it did not affect the country; † that if the country was theirs that drained into Hudson's Bay,‡ this article of the treaty, and the treaty itself, did not affect it. That was the English contention, but that the most that was to be conceded were the identical parts and places which had been taken by the French during the preceding peace and had been recaptured by the English during the war.

Then follows the next war, which was in 1702, there being about five years between the two, and during the five years there was an opportunity for the Hudson's Bay people to state their claim, and there was also an opportunity for the English authorities to set forth the view that I have spoken of, whether rightly or wrongly I do not stop to consider, because I do not think it is of very much importance.

Now, the Hudson's Bay Company reply to the French claims arising out of this Treaty of Ryswick. If your Lordships desire to look at it, you will find it at page 555 of the Joint Appendix. I have stated, I think, the effect of it, and it is not very important, at all events in the view that I contend for. I will not trouble your Lordships with it, except simply just giving you the reference to it.

Then comes the war of 1702, followed by the peace and Treaty of Utrecht—the all important treaty, in the view that we contend for, as firmly establishing the Hudson's Bay Company's claims. And first, perhaps your Lordships will look at the negotiations which led up to that peace, at pages 490 to 494, so far as it concerns Hudson's Bay. "The plan of peace, 1712," is at page 494. The proposition that commissioners should be appointed in order to settle the disputes is

*One only of the forts remained in the company's hands. The others, together with the whole interior country, were in possession of the French. (See *post*, p. 197, note).

† This contention was really that of the French, and in reference to the Treaty of Utrecht.

‡ But no portion of the country, and but one isolated post, remained theirs.

found at page 495, where the articles are marked O. 6, O. 7, and so on. At the top of page 495, it says:

"The King will give up the province of Acadia, with the town of Port Royal, and its dependencies, to Great Britain, as also the Straits of Hudson's Bay."

Then, upon that:

"England demands that the town of Placentia remain in its present state. That the cannon and warlike stores in Hudson's Bay remain for England."

Then the reply of France:

"His Majesty offers to let the fortifications of Placentia remain as they are, upon giving up that place to England; to consent to the demand made of the cannon in Hudson's Bay; and, besides, to cede the Island of St. Bartholomew,"

and so on. And then article O. 6 says:

"After the peace, commissioners shall be appointed on both sides, to ascertain, within the compass of a year, the boundaries of Canada or New France, on one side, and those of Acadia and the lands of Hudson's Bay, on the other, and to settle in a friendly manner all just and reasonable recompenses,"

and so on.

Sir Robert Collier.—That, I understand, they never did.

Mr. McCarthy.—That I shall have to say a word or two about, by and bye. It is not settled definitely whether they did or did not. There is a good deal to be said on both sides, that is certain.* Then, at page 498, there is this, which is from the report of the French plenipotentiaries to the King, April 18th, 1712:

"We have made every possible effort to regain Acadia, or at least to retain Newfoundland, but it has been impossible for us to conclude the matter. They (the English plenipotentiaries) have protested a hundred times that they had express orders to break off the negotiations rather than to give way on either point, or upon that of Hudson's Bay, where they claim even the cannon. We should not have taken their word for this if the Sieur Gaultier had not confirmed what they said."

Then, at page 500, comes the correspondence with regard to the use of the words "restore" and "cede." The English were claiming that the word "restore" should be used, and the French that the word "cede" should be used.† "In the name of God, Sir, order your plenipotentiaries to be less excellent grammarians. Ours, who also understand the force of Latin expressions," and so on. Then "the 9th (10th) article of the plan imports that the King shall give up to the Queen of Great Britain, Hudson's Bay, etc., in the manner they are now possessed by the King and the French." Mark that, my Lords, "in the manner they are now possessed by the King and the French," that is by both parties:

"The plenipotentiaries of Great Britain insist that it shall be expressed that France shall restore not only what has been taken from the English, but also all that England ever possessed in that quarter. This new clause differs from the plan, and would be a source of perpetual difficulties, but to avoid them the King has sent to his plenipotentiaries the same map of North America as had been furnished by the plenipotentiaries of Great Britain. His Majesty has caused to be drawn upon this map a line which describes the boundaries in such a manner as he has reason to think they may easily agree upon this

* The evidence put it beyond controversy that the limits were never settled. This is admitted by the Hudson's Bay Company in their memorials of 1750 and 1759, and the Duc de Choiseul makes a declaration to the same effect as late as 1761.

† See extracts *ante*, p. 113. See also M. de Galissonnière on this subject, *ante*, p. 119, note.

point on both sides. If, however, there should be any obstacle which the plenipotentiaries cannot remove, the decision must be referred to commissaries to be named for the adjustment of the boundaries of America."

Then, passing on to 504, we have the treaty; and the 10th article* of the treaty is the one in question with regard to this:

"The said Most Christian King shall restore to the Kingdom and Queen of Great Britain, to be possessed in full right forever, the Bay and Straits of Hudson, together with all lands and seas, sea coasts, rivers and places situate in the said bay and straits, and which belong thereunto"—

Your Lordships will see, in the note, what the words were. It says:

"There were two originals of this treaty, one in Latin, and the other in French. This translation is that published by authority of the English government, at the time. The expression here rendered 'and which belong thereunto,' is, in the Latin copy, '*spectantibus ad eadem*,' and in the French copy, '*et lieux qui en dependent*.'"

I render the expression "*spectantibus ad eadem*," as looking in that direction. They first speak of all the lands; then follows, looking in that direction—looking that way. In other words it would mean the height of land:

—"no tracts of land or of sea being excepted which are at present possessed by the subjects of France. All which, as well as any buildings there made, in the condition they now are, and likewise all fortresses there erected, either before or since the French seized the same, shall, within six months from the ratification of the present treaty, or sooner if possible, be well and truly delivered to the British subjects having commission from the Queen of Great Britain to demand and receive the same, entire and undemolished, together with all the cannon and cannon-ball which are therein, as also with a quantity of powder, if it be there found, in proportion to the cannon-ball, and with the other provisions of war usually belonging to cannon. It is, however, provided that it may be entirely free for the Company of Quebec and all other the subjects of the Most Christian King whatsoever, to go, by land or by sea, whithersoever they please, out of the lands of the said bay"—

I call your Lordship's attention to that:

—"out of the lands of the said bay; together with all their goods, merchandizes, arms and effects, of what nature and condition soever, except such things as are above referred to in this article. But it is agreed on both sides, to determine, within a year, by commissaries to be forthwith named by each party, the limits which are to be fixed between the said Bay of Hudson and the places appertaining to the French."

Now, with deference, I beg to submit to your Lordships, that the proper construction of that article in the treaty is, that the true boundary was ascertained, that is the limits were fixed, not upon the ground, but that the rule for fixing these limits was fixed in the language of the treaty, and that what the commissaries were to do was to go upon the land, and, as it were, to mark out and settle where that particular point was, so that after the Treaty of Utrecht it was not left to the commissaries to say, "You shall have the height of land," or "you shall have a point parallel," or "you shall have" anything else. I venture to say, with deference to your Lordships, that the duty of the commissaries was to settle the height of land, and to fix it.

The LORD CHANCELLOR.—Which are the words you rely upon?

* Printed *ante*, p. 112.

Mr. McCarthy:

"The said Most Christian King shall restore to the Kingdom and Queen of Great Britain, to be possessed in full right forever, the Bay and Straits of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the said bay and straits, and which belong thereunto."

The Lord Chancellor.—Supposing these words of description had occurred anywhere else, would you have said that it included the watershed?

Mr. McCarthy: What other line is there—if I may venture to put it in that way?

The Lord Chancellor.—I am putting a question for you to answer. Your opponents answered it by saying that there was a certain territory, known by a certain denomination, which had been considered or claimed as falling in that description. No one can possibly say that of necessity it included every stream that ran into Hudson's Bay.

Mr. McCarthy.—Your Lordship will see, on looking again at the map, what the position of the parties was at that time. It certainly required that the French should surrender to the English all the lands they possessed on that bay.

The Lord Chancellor.—Let me take this as an illustration: In the map before us there is, coloured—pink or rose colour,—the country immediately to the north and east of Lake Superior. There runs through that country, just east of Lake Nepigon, a river which is marked "English River," taking its source in a lake well within that pink or rose-coloured country. I do not know whether your contention is that the whole of that lake* was within the Hudson's Bay territory.

Mr. McCarthy.—Yes.

The Lord Chancellor:—Because it drained into Hudson's Bay?

Mr. McCarthy.—Yes.

The Lord Chancellor.—Then it was Hudson's Bay territory within a very short distance of Lake Superior?

Mr. McCarthy.—Yes.

The Lord Chancellor.—Practically up to Fort Nepigon?

Lord Aberdare.—And east of Lake Nepigon, there is a lake from which this English River proceeds.

Mr. McCarthy.—All from English River was north of what was conceded to be Canada.

The Lord Chancellor.—There are two English Rivers on the map. The English River of which I have been speaking is to the east of Lake Nepigon. It seems to have taken its source close to Fort Nepigon. Your argument is, that because that ran into Hudson's Bay it is within Hudson's Bay territory?

Mr McCarthy.—Yes.

The Lord Chancellor.—And not within Canada?

Mr. McCarthy.—Not within Canada.

The Lord Chancellor.—Extending up to that, there is a narrow peninsula, or a narrow isthmus, I should rather say?

Mr. McCarthy.—Yes, owing to the peculiar formation of the height of land at that place.

The Lord Chancellor.—That is your argument?

Mr. McCarthy.—That is my argument.

Then, your Lordship will see that the forts which had been actually settled by the Hudson's Bay Company, and some of which had been taken by the

* Long Lake, east of Nepigon, the source of one of the branches (appearing on the map as English River) of the Albany, and within about eight miles of the shore of Lake Superior.

French, all of them, this treaty says, both French and English, are to be restored to the English.* Fort Rupert, which is at the top of that blue line, at the south-east corner, was settled in 1667. That was then built. Then there is a fort called Moose Fort. I will not speak of that, because, perhaps, that was not built till afterwards.

The LORD CHANCELLOR.—I did not before know that you claimed, as part of the Hudson's Bay territory, any part of that which is coloured rose.

Mr. MCCARTHY.—Perhaps your Lordship will allow me to hand to you this map, as it shews the height of land more clearly marked upon it. In the map that your Lordship has, the height of land is coloured, but it is not so clearly defined as it is in this one [*handing a copy of the Ontario boundary map of 1884 to the Lord Chancellor*].

The LORD CHANCELLOR.—The argument is that the rose-coloured part in the interior belonged to the Hudson's Bay Company? What map is this?

Mr. MCCARTHY.—That is the Ontario map, on which the height of land is more clearly marked.

The LORD CHANCELLOR.—The height of land, and the watershed?

Mr. MCCARTHY.—Yes, it is more clearly marked, that is all. I will satisfy your Lordship that my claim in that respect is right.

The LORD CHANCELLOR.—You say so, but your opponent did not concede that.

Mr. MCCARTHY.—I do not know that he did concede that. I do not know where exactly he put the Hudson's Bay territory. I listened to his argument, and I could not make out where he put the line of the Hudson's Bay territory.

Lord ABERDARE.—It appears to me that the Dominion, in their enlargement of this Manitoba province, violated their own original grant.

Mr. MCCARTHY.—No.

Lord ABERDARE.—Did they not? They gave you a certain portion of the south side of the height of land.

The LORD PRESIDENT.—Yes, that south-eastern corner.

Lord ABERDARE.—Yes.

Mr. MCCARTHY.—Your Lordship sees, instead of stopping short at the height of land, they took the Pigeon River and Long Lake,† and the other water communications, as being the more convenient boundary.‡

Lord ABERDARE.—Then, starting from the Pigeon River, and extending up to the north, there is a portion of the territory assigned to Manitoba.

Mr. MCCARTHY.—If the due north line prevails, between the height of land and the due north line. That is what I spoke of yesterday.

The LORD CHANCELLOR.—However, you have nothing to found the argument upon, about the height of land, except this Treaty of Utrecht.

Mr. MCCARTHY.—That is all; and the claim, which was more clearly and distinctly made afterwards, I will come to in due course.

Now, your Lordships will see, that at that time the Hudson's Bay Company had forts at Fort Rupert, at the mouth of this very Albany River, at the mouth of the Churchill River, much further to the north, and on the Severn River,

* The treaty provided that the "Bay and Straits of Hudson," together with the lands and places "situate in the said bay and straits, and which belong thereunto," should be restored, but that commissaries should fix the limits "between the said Bay of Hudson and the places appertaining to the French" (*ante*, p. 112). It depended, therefore, on the decision of the commissaries what lands and places should be "restored"; and the French view is set out in the papers of d'Auteuil and Galissonnière, respectively, (*ante*, pp. 119, note, and 159, note †) and of Lamothe-Cadillac (Joint App. 513).

† Long Lake, on the line of the international boundary. See *ante*, p. 78.

‡ Not for convenience, but as a prolongation of their southerly boundary to meet the due north line for which, in disregard of the height of land, both Manitoba and the Dominion contended.

which is between the Churchill and the Albany, so that the line of forts and posts extended on Hudson's Bay from (I need not trouble your Lordships with the east) this point north of this blue line, which is called Fort Rupert, to the Churchill or Danish River as it is called, and in point of fact I think, substantially, they had the mouths of all the important rivers, which drain into the Hudson's Bay, even at that date.* Also a fort at Fort Bourbon—or York, or Nelson—at the mouth of the Nelson. There is one at the mouth of the Churchill, one at the mouth of the Nelson, and one at the mouth of the Severn, and the Albany, and Fort Rupert, all which forts had been taken and retaken, and were then occupied either by the French or the English, and were to be restored according to this treaty, with all the lands appertaining thereto—"which belong thereunto," to use the English translation of the treaty—to the English government. I submit, upon these facts being stated, with the interpretation of the treaty, that the result is that that gave, at all events to that extent, to the Hudson's Bay Company all that was drained into the Hudson's Bay—the territories which were embraced by these particular limits; and that all that was left, by the same article of the treaty, for the commissaries to do was to mark out the limitary line—not to determine the principle upon which that limitary line was to be fixed, but to mark out that limitary line, so that it should afterwards appear that the French should not come north of it, and that the English should not go south of it. What both parties were struggling for at that time should not be lost sight of. What they were struggling for was the Indian trade. What the English complained of was, that the French came north here, on the upper part of the rivers, and the Indians who brought the furs down to our forts and factories at Hudson's Bay are intercepted by the French, and that the trade is by that means got by the French. The same sort of thing was said by the French, "You get the Indians that come to Montreal and Quebec." And I think this correspondence, which I will refer to presently, proves, that the only duty of the commissaries was to mark that line, so that north of that line the French would not come, and on the south of it the English should not trespass. But the boundary, I submit, is to be found in the four corners of the Treaty itself, and we are not required to go further.

[*Adjourned till Saturday, July 19th.*]

FOURTH DAY.

SATURDAY, July 19th, 1884.

Mr. MCCARTHY.—I now produce another map.

Lord ABERDARE.—That map is coloured so as to shew the claims of the Hudson's Bay Company?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—The part coloured dark purple is that part which I suppose is disputed?

* This is a misapprehension. The company then held only one fort, Albany, the French having been in possession of all the other forts for a long series of years; the French were also entitled to Albany under article 8 of the Treaty of Ryswick, and it had in fact been in their possession for some six years (Joint App. 580), and when it passed from them they paralyzed its trade, leaving it only a burden on the company's hands. The company, in their memorial to the Lords of Trade, in 1702, and in their petition to Queen Anne, in 1711, set out these facts, adding that they are "surrounded by the French on every side, viz., by their settlements on the lakes and rivers from Canada to the northward, as also from Port Nelson to the southward." (See also appendix B. hereto).

Mr. McCarthy.—Yes.

The Lord Chancellor.—You admit this [*pointing*] to be Ontario?

Mr. McCarthy.—Yes.

The Lord Chancellor.—That seems to depend on the theory of the watershed?

Mr. McCarthy.—Yes.

Sir Robert Collier.—You say Canada has exercised jurisdiction up to what is called the height of land?

Mr. McCarthy.—Yes.

The Lord Chancellor.—We have nothing to do with anything that goes further east than the boundary of the yellow land claimed by Manitoba?

Mr. McCarthy.—No. The only object, of course, is to find out the west line.

Now, my Lords, when your Lordships adjourned on Thursday afternoon, I had reached the point in the historical narrative that I was endeavouring to present to you, of the Treaty of Utrecht, and the bearing that treaty had upon the question as to the limits of the Hudson's Bay lands, so far at all events as that was determined by the dealings between the French and English. I had made some reference to matters which I had not at the moment perhaps given your Lordships proof of; and I propose, in the first place, to give your Lordships the proof, as briefly as I possibly can, of the more important events up to that date. I had divided my statement, as I thought, in a manner which would make more easily understood what I desired to say with reference to those periods of time. In the first place, up to the time of the charter, 1670, I think it is very evident, and I was willing to take it for granted at all events, that the English had been the discoverers of Hudson's Bay, and I would just now present to your Lordships a map called Sanson's map—a very early map prepared by the French. It is dated 1656. This is a photograph of the map [*producing same*]. It is important in this view. It shews that what was regarded in those days as New France or Canada was in point of fact south of a line which, I take it for granted, and I think it appears fairly enough on the map, was assumed to be the watershed line.*

The Lord Chancellor.—The words "Canada ou Nouvelle France" are written almost up to Hudson's Bay.

Lord Aberdare.—The rivers are all made to flow into the St. Lawrence.

Mr. McCarthy.—Except those going into Hudson's Bay. The copy I think is much easier to follow, and I am told it is correct. It has been coloured, shewing more distinctly the difference between the two. The colouring is mine.

Sir Robert Collier.—This map is obviously very incorrect.

Mr. McCarthy.—At that time nothing was known west. All I am shewing is this, that at that date, 1656, the French acknowledged that the English owned or were possessed of all the north country, by Hudson's Bay.†

The Lord Chancellor.—What strikes me at present is this, that they carry the dotted line, which seems to be the northern boundary to Canada as here laid down, close up to, if not in actual contact with the waters of Hudson's Bay.

Mr. McCarthy.—Yes. I do not pretend to say that that accurately lays down the line.

Lord Aberdare.—It is intended to be a watershed line, up to the western extremity of Hudson's Bay. Further than that we know nothing.

Mr. McCarthy.—No.

* An examination of the actual photograph, and a comparison with other maps of Sanson, fail to sustain these deductions of counsel. See *post*, p. 201, note*.

† There was no such acknowledgment. See *post*, p. 200, note *, and appendix B hereto.

Sir ROBERT COLLIER.—Does it appear on the face of it to be a watershed line?

Mr. McCARTHY.—I think so.

Lord ABERDARE.—It really is much more a map defining the limits of Labrador on one side, and Canada on the other.

Mr. McCARTHY.—I do not say it is accurate as a map. My object in citing it is to shew that, at that date, the French seem to have confined their New France or Canada to the watershed of the St. Lawrence.* In confirmation of that, if your Lordships will look at the boundary descriptions in the commissions of that date, from the French King to the Governor of New France, that view is very much confirmed.†

* Throughout the whole evidence there is not one scrap to justify such a contention. The French claimed consistently, throughout, that their Canada had no other limits on the north than the pole or the Arctic Circle; and on the west, the Western Sea or the Mer du Sud.

† The commissions and charters do not bear out this contention. The charter of 1627 covered the regions to the Arctic circle, and the commissions in question variously embraced not only the valley of the St. Lawrence, but also "the places that depend thereon in New France;" and "the isles and lands adjacent on both sides;" and, "on the north, as far as the lands of the said country extend;" and in one instance, a special reservation of a portion of these territories is specifically described as extending northward to the parallel of 52°:—

OFFICIAL DESCRIPTIONS OF BOUNDARIES IN FRENCH COMMISSIONS AND CHARTERS.

Sieur de la Roche, 12th January, 1598.

"Our Lieutenant-General in the said countries of Canada, Hochelaga, Newfoundland (Terresneuves), Labrador, the River of the Great Bay (Riviére de la Grande Baye), of Norembégue, and territories adjacent to the said provinces and rivers, these being of great length and extent of country, and not inhabited by the subjects of any Christian Prince."

Sieur Samuel de Champlain, 15th October, 1612.

Champlain was commissioned to build forts, "not only in Quebec, but in other places where our authority extends, and so far in the interior as he may be able, to establish and make known the name, power and authority of His Majesty, and therein to bring under subjection, submission and obedience, all the people of the said territory and the surrounding countries, and by this and all other lawful means, to invite them and have them instructed, incited and stirred up to the knowledge and service of God and to the light of the Catholic, Apostolic and Roman faith and religion, there to establish it, and in its practice and profession to maintain, guard and preserve the said places, under the obedience and authority of his said Majesty . . . for this purpose to make discoveries and explorations in the said territories, especially above the place called Quebec, as far in the interior as he can penetrate, whether overland or by means of the rivers which discharge into the said river, the St. Lawrence, with the view of attempting to find a practicable road through the said country to China and the East Indies, or taking another route, as far as he can penetrate along the coasts and in the interior, making careful search and survey for all sorts of mines of gold, silver, copper and other metals and minerals, having them excavated, extracted, purged and refined, for conversion and disposal according to and as prescribed by the edicts and regulations of His Majesty and as will be by us commanded."

Sieur Samuel de Champlain, 15th February, 1625.

This commission is in pretty much the same terms as that of 1612, but contains in addition special powers for the exclusion, arrest and punishment, and the confiscation of the vessels and goods, of all persons, whether French or others, found trafficking or communicating with the savages and people, particularly within the region (reserved by the King to the Viceroy and Lieutenant-General of New France) extending from the latitude of Gaspé in the 48th to the 49th degree as far north as the 52nd degree.

Charter of the Company of the Hundred Associates, 29th April, 1627.

IV. And to recompense the said Company, in some measure, for the great outlays and advances which it will be necessary for it to make in order to reach the said people, and for their support and preservation, His Majesty will give in perpetuity to the said Hundred Associates, their heirs and assigns, in all propriety, right and seigniory, the fort and habitation of Quebec, with all the said country of New France, called Canada, as far along the coast from Florida, which the kings, predecessors of His Majesty, had caused to be settled, ranging along the sea coasts to the Arctic Circle for latitude, and for longitude from the island of Newfoundland, drawn to the west, to the great lake called the Fresh Sea, and from there, within the lands and along the rivers which pass there and discharge themselves into the river called Saint Lawrence, otherwise the Great River of Canada, and into all the other streams which flow to the sea, lands, mines, minerals, to enjoy forever the said mines, in accordance with the ordinance, and the forts and harbours, streams, rivers, ponds, islands and islets, and in short the whole extent of the said country, both in length and breadth, and beyond so far and as much farther as they can extend and make known the name of His Majesty, reserving for his said Majesty only the jurisdiction of the faith and homage which shall be borne him and the kings his successors, by the said Associates, or one of them, with a crown of gold, of the weight of eight marks, at each change of king, and the appointment of the officers of sovereign justice, who will be nominated and presented to him by the said Associates whenever he will judge it proper to establish any; permitting the said Associates, to cast cannon and cannon-ball, forge all manner of offensive and defensive

The Lord Chancellor.—That is, they laid down their Canada as including the watershed of the St. Lawrence, and they make all the streams within their limits flow into the St. Lawrence.

Lord Aberdare.—They acquired a great deal of land with that

Mr. McCarthy.—I think, with deference, they did not, beyond Louisiana. In this country, I do not think they acquired anything.

Lord Aberdare.—Not in the hundred years?

Mr. McCarthy.—No, not beyond the watershed.* In point of fact, the country between the watershed of the St. Lawrence and the north was the

arms, manufacture gunpowder, build and fortify places, and do generally, in the said places, all things necessary either for the security of the country or for the preservation of commerce.

VII. Furthermore, His Majesty will grant to the said Associates, for ever, the trade of all leathers, skins and furs of the said New France: and, for fifteen years only, commencing on the 1st day of January, of the year 1628, and ending on the last day of December, 1643, all other commerce, whether by land or sea, which can be created, derived from, negotiated and carried on, in any manner whatsoever, over the extent of the said country, or as far as it can be extended, reserving the cod and whale fisheries only, which His Majesty wishes to leave free to all his subjects, revoking, to this end, all other concessions contrary to the above, even the afore-mentioned articles granted to William de Caën and his associates: and to these ends his said Majesty will, for the said time, interdict all the said commerce as well to de Caën as to his other subjects, under penalty of the confiscation of vessels and merchandize, which confiscation shall belong to the said company, and the said My Lord the Grand Master shall grant no leave, passport or permission to any others than to the said Associates for the above voyages and commerce to the whole or any portion of the said places.

Sieur Huault de Montmagny, 6th June, 1645.

"Governor and our Lieutenant-General representing our person at Quebec, and in the provinces watered by the River St. Lawrence, and the rivers which discharge into it, and the places that depend thereon, in New France."

Sieur de Lauzon, 17th January, 1651.

"Governor and our Lieutenant-General over the whole extent of the River St. Lawrence, in New France, the isles and lands adjacent, on both sides of the river and the other rivers that discharge therein, as far as its mouth, taking ten leagues near to Miscou on the south, and on the north as far as the lands of the said country extend (*du nord, autant s'étendent les terres du dit pays*), in the same manner that it was held and exercised by the said Sieur Daillebout."

Sieur Vicomte d'Argenson, 26th January, 1657.

The description in the commission of Sieur de Lauzon is repeated, and "in the same manner that it was held and exercised by the said Sieur de Lauzon."

Sieur de Mezy, 1st May, 1663.

The description in the commission of the Vicomte d'Argenson is repeated, and "in the same manner that it was held and exercised by the preceding governors."

Sieur de Courcelles, 23rd March, 1665.

"Governor and our Lieutenant-General in Canada, Acadie, and the island of Newfoundland, and other countries of Northern France (et autres pays de la France Septentrionale), in the place, as aforementioned, of the said Sieur de Mézy."

* Counsel was in error. The Charter of 1627, to "La Compagnie de la Nouvelle France dite Canada"—otherwise the Company of the Hundred Associates—covers not only the lands watered by the St. Lawrence and tributaries, but also those on all other rivers in this region which flow to the sea; in fact, all the territories up to the Arctic circle: it replaced the Montmorency (De Caën) company's charter of the same, granted in 1620. From that time—nay, from the time, 1608, of the founding of Quebec—the whole trade was in the hands of the French, brought overland by the lakes and rivers, to the posts of the height of land, the great lakes and the St. Lawrence, there being, therefore, no need of building forts on the shores of the Bay. Then, there were formal acts of taking possession, by Champlain in 1610; by the Company of Canada, 1640; by Bourdon, in 1656, when he made a voyage from Quebec to the Bay, by sea; by Dablon, at the height of land, and in presence of the northern Indians, in 1661; by Couture, Duquet and L'Anglois, in 1663; by St. Lusson, in 1671; by Albanel and St. Simon, in 1672. The said company, in 1661, built Fort Nemiscau on the lake of that name (on the River Rupert); Radisson and Des Grosselliers were in the region of the North-West, and visited the Bay, in 1666, in the interest of the succeeding company—La Compagnie des Indes Occidentalis—whose servants they then were; which company, later on, in 1673, built other three forts in this region, viz., one at the Abbitibi River, one on the Pisgoutagany Lake (otherwise Lake Ste. Anne), on the Albany, and one between the Outoulibis and the Assenipoëls. They had also one on the Moose River the same year. Fort Bourbon, at the mouth of the Nelson, was first built by the French in 1676, and re-established by them in 1682. All these were north of the height of land. (Joint App. pp. 461-8, 475-80, 566, 567, 619, 625-6, 628, 633, 647-8, etc.; Ferland, i, 200). Subsequently, from 1684 onwards, the French built several other forts, as Abbitibi, St. Germain, etc., beyond the height of land. Besides these, they had several at, or near, the same height of land. They had also captured the establishments of the Hudson's Bay Company on the shores of the Bay. After the Treaty of Utrecht, they retained a continuous command of the interior and its trade, still holding their old posts to the north of the height of land and establishing new ones, and in the North-West they had a chain of forts in a region in which the Hudson's Bay Company had never set foot. (See appendix B hereto).

Hudson's Bay country, the country on the west was the Mississippi country, which they called Illinois and Louisiana, and granted that they had Louisiana and Illinois, which undoubtedly they had up to that line shewn on the copy produced on Thursday, still there was nothing to the north but Canada and the Hudson's Bay.

Sir ROBERT COLLIER.—They go very near indeed to Hudson's Bay.

Mr. MCCARTHY.—Yes. That was intended to be the water line. If that was incorrectly laid down, we have to find which the true water line is; and about that there is no dispute.

The LORD CHANCELLOR.—That is an ingenious way of putting it—you treat as the cardinal point here, the water line. It is not said on the other side, that they mean to relinquish their claim to any territory here put down as French.

Mr. MCCARTHY.—I do not know, as a matter of fact, that they represented any river on this map as flowing into the St. Lawrence, which does not, as a matter of fact, flow into the St. Lawrence. It is correct as far as that goes.

Lord ABERDARE.—This map does not touch that portion of Canada which is west of Lake Superior.

Mr. MCCARTHY.—It is the foundation of the claim—we must start at the commencement.

Lord ABERDARE.—I think this may be assumed to be a map shewing the limits between La Nouvelle Bretagne and La Nouvelle France.*

Mr. MCCARTHY.—If you look at page 649 of the Joint Appendix, you will find the commissions that were granted by the French King. There is a commission to Montmagny. The Hudson's Bay rights began in 1670. Then the question is, what had the English a right then to claim as theirs, and what had the French a right to claim? I find that in 1645, 1651, 1657 and down to 1663, the French limited their claim to the territory watered or drained by the St. Lawrence. Then the English take possession of the Hudson's Bay. They claim that having taken possession of the Hudson's Bay, and having discovered it prior to that, gave them the right to take all the watershed of Hudson's Bay. The effect would be, if on the one hand the French had a right to the watershed of the St. Lawrence, and the English in 1670 became entitled to the watershed of Hudson's Bay, then, that watershed being ascertained, the proper boundary between the two countries would be defined. Now these commissions go to shew that what the French in those days were claiming, was, as I say, the watershed of the St. Lawrence.† That brings it up to 1670. Then your Lordships recollect the language of the charter. The first commission gives the words more fully. It is the one to Montmagny:

—"and in the provinces watered by the St. Lawrence, and the rivers which discharge into it, and the places that depend thereon in New France."

* This map of Sanson's would appear to be the same, or at all events to have the same distinctive features, as No. 6 in the Notes on Maps (Ont. App. p. 96), and is, in its northerly portions, not a French original, but evidently a reproduction, in part, of an English map. Moreover these portions are confessedly based on English, Danish and other relations: "Ce qui est le plus advancé vers le Septentrion est tiré de diverses relations des Anglois, Danois," etc; and English, Dutch and Danish names abound, as "James his Bay," "Lland of Good Fortune," "Hollandsche Bay," "Sadel Eyl," "Swarte Hoeck," etc., etc. Map No. 5*a*, by this author, of about the same date, as also map No. 4, by the same, published in 1650, have the names "Canada" and "Canada ou Nouvelle France," respectively, printed across Hudson's Bay, and that country has no limit on the north. (*Ib.*) It is, therefore, clear that the line upon the map in question could not have been intended as a northerly boundary of Canada. It was probably copied from the same English map. East of the Bay, it forms the southerly limit of La Nouvelle Bretagne, as suggested by Lord Aberdare. The French always claimed that their Canada or New France extended to the Arctic circle, or to the Pole; the only suggestion of a more restricted limit was that of the 60th parallel, in connection with the Treaty of Breda

† It has been already shewn that these contentions of counsel were not sustained by the evidence. See *ante*, p. 199, notes* and†; p. 200, note*.

The LORD CHANCELLOR.—"The places that depend thereon," goes further.

Mr. MCCARTHY.—I submit that means the places that depend on the rivers. It means the land drained by those rivers.

The LORD CHANCELLOR.—I take it the words, "in the provinces watered by the St. Lawrence, and the rivers which discharge into it," do *prima facie* relate to the district so watered; but then, the words "and the places that depend thereon," mean the places that depend upon those provinces, whether watered or not.

Mr. MCCARTHY.—The effect of that would be to take in the whole continent, because every place bordered on the provinces.

The LORD CHANCELLOR.—No. If the French had annexed something which was not, strictly speaking, watered by the St. Lawrence or the rivers which discharged into it, it would become a dependency of Canada.

Mr. MCCARTHY.—Their claim was confined to the St. Lawrence at that date.

The LORD CHANCELLOR.—This particular commission strikes me as indicating something more.

Sir ROBERT COLLIER.—There is a commission of 1665, which says nothing about watershed that I can see.

Mr. MCCARTHY.—No. Will your Lordship look at the second commission, in 1651?

Sir ROBERT COLLIER.—I was looking at the more recent one.

Mr. MCCARTHY.—From time to time the French were increasing in their encroachments. Of course, it is not everything the French claim that is to be taken as belonging to them.

The LORD CHANCELLOR.—Nor, on the other hand, is much to be founded on the argument which says that at a certain earlier date they do not appear to have claimed as much as they did afterwards.

Mr. MCCARTHY.—No. We trace it historically, and endeavour to shew the relative position of the countries at the time.

Lord ABERDARE.—They treated a large part of the country within that [*Hudson's Bay*] watershed as theirs.

Mr. MCCARTHY.—No. I think they really did not.

Lord ABERDARE.—Here is the boundary claimed by the French. There are various French fortresses there.

Mr. MCCARTHY.—No doubt they are encroaching on the Hudson's Bay, and it was complained of by the English that they were doing so, and that was forbidden to them.*

Sir ROBERT COLLIER.—Look at the next commission of 1651 on the same page 649. It says:

"Over the whole extent of the River St. Lawrence, in New France, the isles and lands adjacent on both sides of the river, and the other rivers that discharge therein, as far as its mouth, taking ten leagues near to Miscou, on the south, and on the north as far as the lands of the said country extend."

Mr. MCCARTHY.—It says: "In the same manner that it was held and exercised by Sieur Daillebout." It is limited, but I do not think we have the limitation. Then, your Lordships will see that in 1670, when the French began to be pressed with the encroachments upon their trade, so to speak, of the Hudson's Bay Adventurers, they put forward claims to the whole of the continent, and that gave rise to disputes which they attempted to settle by the Treaty of Neutrality. Now, one important document, as it seems to me, as shewing the

* There is no evidence of any such command.

view then entertained by the English Government, is to be found at pages 480 and 481 of the Joint Appendix. This was in the correspondence between the French and English after the Treaty of Neutrality, and with a view of settling their disputes upon this part of the continent, the English in point of fact claiming all that the Hudson's Bay Company were entitled to, and the French endeavouring to confine the Hudson's Bay Company to the Bay, and to the forts they had—in point of fact to drive them from the Bay.

The LORD CHANCELLOR.—This seems to be in 1687.

Mr. MCCARTHY.—Yes, at about line 36 it says:

"And it will be sufficient answer to the greatest part of the French paper to assert that the country of Canada and that of Hudson's Bay, are two different provinces, and have no relation but that of neighbourhood, as may appear by ancient and modern maps, nor did the English, when they were possessed of Canada itself, esteem the country of Hudson's Bay as appertaining to it, and it is to be hoped that it will not now be reputed a dependence of Canada, which would be a pretension not to be advanced between two Crowns that entertain so good a correspondence together, and which would quite destroy the end of the late Treaty of Neutrality, since instead of preserving peace in time of war it will be looked upon as the occasion of the worst effects of war in the time of peace, if so notorious an invasion should remain unpunished, or satisfaction refused for the losses that have been sustained."

That is in 1687, after the Treaty of Neutrality.* There are great numbers of papers here, between the French and English commissioners, upon this disputed question as to the Hudson's Bay.

Lord ABERDARE.—What is the meaning of the expression, "nor did the English when they were possessed of Canada itself esteem the country of Hudson's Bay as appertaining to it?"

Mr. MCCARTHY.—The English claimed to be the discoverers of Canada, and afterwards to have ceded it for some consideration, which they alleged the French had not paid, and they were talking of reviving that old claim.† This particular part seems to me to be good as shewing that the claim put forward by the English at that early date was that the Hudson's Bay was a province.

The LORD CHANCELLOR.—The claim was first made by Sir William Alexander, Earl of Stirling and Viscount Canada.

Mr. MCCARTHY.—Now, it is a fact, which is not perhaps unimportant with reference to these encroachments, that it was charged in this correspondence, or negotiation, between the English and French that the French King had rather disapproved of what his Canadian subjects had been doing in the neighbourhood of Hudson's Bay. He professed at all events to repudiate it. That, your Lordships will see stated at page 484 of the Joint Appendix, and not in any place denied, that I have been able to find‡

Sir ROBERT COLLIER.—That, is the answer of the Hudson's Bay Company.

Mr. MCCARTHY.—Yes:

"But the said English company cannot but hope better from the justice of His Most Christian Majesty, who having declared his disapproval of his subjects' proceedings in this affair, in so plain a case will not infringe the good correspondence that is between the two Crowns."

All through, your Lordships will find the Hudson's Bay Company and the English government are interchanging correspondence. The English government applies

* The French memorial, to which this is the reply, is at p. 475 of the Joint Appendix, and claims an absolute right to the lands and shores of Hudson's Bay, upon grounds set out at length.

† The actual facts were, that the English, under Kirk, had conquered and occupied Canada, in 1629, subsequently restoring it, without limits, to France, by the Treaty of St. Germain en Laye, 1632 (Joint App. 173-4, 453).

‡ It was an unsupported allegation of the company, not needing denial. See *post*, p. 204, note.

to the Hudson's Bay Company to know what they are to say, and the Hudson's Bay Company reply, and one thing is dovetailed into another.

Sir ROBERT COLLIER.—What they represent to His Majesty is, "that in case the French be suffered to be sharers in the Bay and Straits of Hudson, or be permitted to trade therein, the Company cannot any longer subsist." What they protested against was the French claiming the trade, or to be possessed of land in the Bay or Straits of Hudson.

The LORD CHANCELLOR.—That would include Fort Nelson, a long way to the north.

Mr. MCCARTHY.—At that time the French had captured many of the forts on the bay, and the English were claiming restitution for this outrage, as they called it, and the French King in answer to the English stated that he did not endorse the conduct of his subjects* Now, at page 484, is a report of the English commissioners to the King, finally, upon the result of all this:

"Whereupon their Lordships agree to report their opinions to His Majesty, as follows: We your Majesty's Commissioners appointed to treat with the Ambassador and Envoy Extraordinary of His Most Christian Majesty, concerning the differences that have happened between Your Majesty and the French in America, have had frequent conferences with the said Ambassador and Envoy Extraordinary, in order to obtain satisfaction for the damages Your Majesty's subjects have lately sustained from the French in Hudson's Bay, with restitution of the three forts, which by surprise were seized on by them, as also touching several other differences depending between the two Crowns, and as to the business of the Hudson's Bay, having already acquainted your Majesty with our proceedings therein—" now here is the opinion—"we do further add our humble opinion, that, as it plainly appears, Your Majesty and your subjects have a right to the whole Bay and Straits of Hudson, and to the sole trade thereof, so it may be fit for Your Majesty to support the Company of Hudson's Bay in the recovery and maintenance of their right, since otherwise that trade will be totally lost, and fall into the hands of the French if they be permitted to continue in the possession of those forts, or of any fort or place of trade within the said bay or straits."

Sir ROBERT COLLIER.—"Within the said bays or straits," that seemed to be their pretension at the time.

Mr. MCCARTHY.—It goes further: "the whole bay and straits of Hudson." Of course the important thing was the trade. That is to say the trade of the Indians, which was brought down by the different rivers to Hudson's Bay.

The LORD CHANCELLOR.—Then, there is a proposal for settlement of the boundary.

The LORD PRESIDENT.—Those words there are given more fully at page 484, and in the same terms as those found in the Hudson's Bay Company's charter: "with the rivers, lakes and creeks therein, and the lands and territories thereto adjoining." That is at line 9. Those are nearly identical with the terms in the charter.

Mr. MCCARTHY.—Yes.

Sir, ROBERT COLLIER.—They say it "comprehended Fort Nelson."

* We have only the allegation of the company for this statement, no proof whatsoever being adduced, and there is specific evidence to the contrary. Radisson and Des Grosselliers' proceedings of 1682 were pursuant to instructions from the authorities (Joint App, 468, 622), as were also the military and naval expeditions under De Troyes and D'Iberville, in 1686 and subsequent years, resulting in the destruction or capture of the Hudson's Bay Company's forts, ships and other property. (*Ib.*, 626, 630, 634, 636; Ontario App. 7). Then, the King, Louis XIV., in a communication to Governor De La Barre, dated Fontainebleau, 5 August, 1683, instructs him "to prevent the English, as much as possible, from establishing themselves in Hudson's Bay, possession whereof was taken in my name many years ago;" and in a despatch from the Minister of State, De Seignelay, to De La Barre, dated 10 April, 1684, the latter is severely censured for releasing an English vessel which had been captured by the French in Hudson's Bay. (Joint App. 623-4).

Mr. McCarthy.—Yes, "as part of the whole." Now we have his English Majesty's sanction for that.

Sir Robert Collier.—It is a long way to the north.

Mr. McCarthy.—There is no doubt part of this that has been awarded, was Hudson's Bay. That part which, beyond all doubt, the Hudson's Bay Company had a right to claim, is the part ceded by the award as not being Hudson's Bay territory.* Now, the memorandum is at page 485:

"His Majesty's commissioners and the commissioners of France appointed to treat concerning differences in America being met, their Lordships delivered to the French commissioners a general memorial declaring His Majesty's pleasure touching the several matters in difference, and that His Majesty had empowered them to treat concerning the settling of limits in America, whereupon the French commissioners do promise to return an answer to such points wherein they are enabled so to do, and to receive the directions of the King their master concerning the others, and do likewise propose that the subjects of both Kings be restrained from all acts of hostility."

Now, we find the King's resolutions at line 20:

"His Majesty's commissioners appointed to treat with the commissioners of the Most Christian King, for the execution of the Treaty of Neutrality in America, have received His Majesty's orders to acquaint the said commissioners, that having maturely considered his own right, and the right of his subjects, to the whole Bay and Straits of Hudson, and having also been informed of the reasons alleged on the part of the French to justify their late proceedings, in seizing three forts which for many years past have been possessed by the English, and in committing several other acts of hostility, to the very great damage of the English company of Hudson's Bay: His Majesty doth, upon the whole matter, conceive the said company well-founded in their demands, and has therefore ordered us to insist upon his own right, and the right of his subjects, to the whole Bay and Straits of Hudson, and the sole trade thereof, as also upon the demand of full satisfaction for the damages they have received, and restitution of the three forts surprized by the French. We are also ordered to declare to the French commissioners, that His Majesty had given us powers and directions to enter into a treaty with the said commissioners for the adjusting of limits between the dominions of both crowns in America, and doing everything else that may conduce to the removing all occasion of differences between the two nations."

The Lord Chancellor.—Which, I suppose, they never did settle.

Mr. McCarthy.—No my Lord. Nothing came of this attempt to settle these boundaries. This was before the Treaty of Utrecht, and still earlier, before the Treaty of Ryswick.

Now, the next matter, and it is not unimportant, as I understand your Lordships' view of this question, is the Act of 2nd William and Mary, 1690, page 348 of the Joint Appendix. It is only important as shewing the recognition of the Hudson's Bay claim by the Act of Parliament.† I do not know that your Lordships require me to address you upon that.

The Lord Chancellor.—We have already indicated that you may conduct your argument on the supposition that you need not go into any question as to the validity of the Hudson's Bay charter.

Mr. McCarthy.—The Act does confirm, in the clearest way, for a limited time, the charter of the Hudson's Bay Company in every respect. That is in the year 1690.

Sir Robert Collier.—No, it only takes the very words of the charter, and recites it.

*See *ante*, p. 190, note†.

† Imp. Act, 2 W. & M., cap. 15, sess. 1 (Private Acts). The confirmation of the Charter by this Act was limited to a period of seven years.

Mr McCarthy.—Then, at page 635, I refer to the statement as to Fort Nelson being one of the most important forts. Fort Nelson is to the north. One of the early discoverers died there in the winter, and it was called Port Nelson. It is a little below the Churchill River, your Lordships will see. I give your Lordships the reference where it is spoken of as being the most important point in Hudson's Bay, at page 635. Then, the Treaty of Ryswick I think I mentioned to your Lordships on Thursday, and I need not trouble your Lordships again to take a note of it. The next reference is to page 555 of the Joint Appendix,* and it is a very full and clear account of the right of the Hudson's Bay Company, and as to all the discoveries and so on. It is an answer of the Hudson's Bay Company. Again, at pages 559 to 562, is another statement,† which is very precise as to dates, places and events. I do not propose to trouble your Lordships with reading them, but I will first give you the references. That is in 1700. Then come the papers at pages 562 and 563, which I ought to refer to.‡

*"A deduction of the Right and Title of the Crown of Great Britain . . to all the straits, bays, seas, rivers, lakes, creeks, islands, shores, lands, territories and places whatsoever within Hudson's Straits and Hudson's Bay, and of the rights and property of the Hudson's Bay Company . . " (1699). The French answer to this document is at page 637, Joint App.

† Reply of the Hudson's Bay Company to the answer of the French commissaries, June, 1699.

‡These are the company's memorials of 10 July, 1700, and 29 January, 1701, to the Lords Commissioners of Trade and Plantations, proposing the Albany River as the boundary on the west side of the Bay; and by the first memorial, the Rupert River, and by the second, the East Main River, as the boundary on the east side of the Bay. Also a letter, from the Secretary of the Lords Commissioners, to the company, 22 January, 1701, suggesting the parallel of 52½° as the line on the east side. They are as follows:—

The Company's Claims after the Treaty of Ryswick.

[*To the Right Honorable the Lords Commissioners of Trade and Plantations.*]

The limits which the Hudson's Bay Company conceive to be necessary as boundaries between the French and them in case of an exchange of places, and that the company cannot obtain the whole Straits and Bay, which of right belongs to them, viz.:—

1. That the French be limited not to trade, by wood-runners, or otherwise, nor build any house, factory or fort beyond the bounds of 53 degrees, or Albany River, vulgarly called Chechewan, to the northward, on the west main or coast.

2. That the French be likewise limited not to trade, by wood-runners, or otherwise, nor build any house, factory or fort beyond Rupert's River, to the northward, on the east main or coast.

3. On the contrary, the English shall be obliged not to trade, by wood-runners, or otherwise, nor build any house, factory or fort beyond the aforesaid latitude of 53 degrees, or Albany River, vulgarly called Chechewan, south-east towards Canada, on any land which belongs to the Hudson's Bay Company.

4. As also the English be likewise obliged not to trade, by wood-runners, or otherwise, nor build any house, factory or fort beyond Rupert's River, to the south-east, towards Canada, on any land which belongs to the Hudson's Bay Company.

5. As likewise, that neither the French or English shall at any time hereafter extend their bounds contrary to the aforesaid limitations, nor instigate the natives to make war, or join with either, in any acts of hostility to the disturbance or detriment of the trade of either nation, which the French may very reasonably comply with, for that they by such limitations will have all the country south-eastward betwixt Albany Fort and Canada to themselves, which is not only the best and most fertile part, but also a much larger tract of land than can be supposed to be to the northward, and the company deprived of that which was always their undoubted right.

And unless the company can be secured according to these propositions, they think it will be impossible for them to continue long at York Fort (should they exchange with the French), nor will the trade answer their charge; and therefore if your Lordships cannot obtain these so reasonable propositions from the French, but that they insist to have the limits settled between York and Albany Fort, as in the latitude of 55 degrees or thereabouts, the company can by no means agree thereto, for they by such an agreement will be the instruments of their own ruin, never to be retrieved.

By order of the General Court,

Confirmed by the Court of the said Company, 10th July, 1700.

Wm. Potter, Secretary.

To the Governor or Deputy-Governor of the Hudson's Bay Company, or either of them.

Gentlemen,—Upon consideration of what was this day offered to the Lords Commissioners for Trade and Plantations, by yourselves and other members of the Hudson's Bay Company, their Lordships have commanded me to acquaint you with their desire that the resolution of your [Court] may be taken and communicated to them, whether (in case the French cannot be prevailed with to consent to the settlement of the boundaries proposed in your Court of the 10th July last), the said Court will not think fit to consent, that the limits on the east side of the Bay be extended to the latitude of 52½ degrees, with whatever fur-

Lord ABERDARE.—Which is Rupert's River.

Mr. MCCARTHY.—It is to the east. It is just north of the blue line. It is the north-east corner of the awarded territory, practically.

Lord ABERDARE.—I see that it was their contention, after the Treaty of Ryswick, that the French had no right to any posts eastward of Rupert's or of Hudson's River.

Mr. MCCARTHY.—I am coming to that, because these are the only documents, from first to last, that give even the slightest colour of foundation for the award.

Lord ABERDARE.—Just tell me this, if that is so. The map we have here, is the Ontario map?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—And therefore you do not accept it, of course?

Mr. MCCARTHY.—Yes, my Lord, I do; but I do not accept all the statements on it.

Lord ABERDARE.—It is with reference to a statement on it that I wanted to ask you. If you look to the north portion, along the line of the Albany, you will see written there, and across James' Bay: "Southern boundary"—that is, the

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ther that Court may think advisable to propose, in reference to their own affairs, for the more easy settlement of all disputes between the Company and the French in Hudson's Bay.

Whitehall, January 22nd, 170⅘. W. P[OPPLE].

To the Right Honourable the Lords Commissioners for Trade and Plantations.

The Hudson's Bay Company have lately exhibited to your Lordships their resolution of their Court, the 10th of July last, concerning limits between them and the French in Hudson's Bay, and though the Company cannot but still insist upon their undoubted right to the whole Bay and Straits of Hudson, as has been clearly made out by them:

Yet in obedience to your Lordship's letter of the 22nd inst., and to shew how desirous they are to comply therewith as much as in them lies, and is consistent with their future safety, they do further offer to your Lordships the following proposals of limits between them and the French in Hudson's Bay, viz:—

1. That the French be limited not to trade, by wood-runners or otherwise nor build any house, factory, or fort to the northward of Albany River, vulgarly called Checheawan, on the west main or coast.

2. That the French be likewise limited not to trade, by wood-runners or otherwise, nor build any house, factory, or fort to the northward of Hudson's River, vulgarly called Canuse River, on the east main or coast.

3. On the contrary, the English, upon such an agreement, do engage not to trade, by wood-runners [or otherwise], nor build any house, factory, or fort to the southward of Albany River, vulgarly called Checheawan, on the west coast, on any ground belonging to the Hudson's Bay Company.

4. As also, the English be likewise limited not to trade, by wood-runners or otherwise, nor build any house, factory, or fort to the southward of Hudson's River, vulgarly called Canuse River, on the east coast, on any ground belonging to the Hudson's Bay Company.

5. That all the islands in the said Bay and Straits of Hudson, lying to the northward of Albany River, on the west coast, and of Hudson's River, vulgarly called Canuse River, on the east coast, shall be and remain to the English.

6. Likewise that all the islands in the said Bay of Hudson, lying to the southward of Albany River, on the west coast, and of Hudson's River, vulgarly called Canuse River, on the east coast, shall be and remain to the French.

7. That neither the French or English shall at any time hereafter extend their bounds contrary to the aforesaid limitations, or instigate the natives to make war, or join with either in any acts of hostility, to the disturbance or detriment of the trade of either nation.

These terms the company are willing to agree to, upon condition they may be secured from any claim that has been, or may be made on them by virtue of the 8th Article of the Treaty of Ryswick, or by any other matter or thing relating to the said treaty. And if the French think fit to accept thereof, the company are willing to exchange places with them, but not without settling of limits; for that the said 8th Article which saith there shall be an exchange of places, doth also say, that limits shall be likewise settled, and it would seem very unreasonable that one should be performed without the other. As to the company's naming of rivers as boundaries, and not latitudes, the same is more certain and obvious, both to the natives as well as Europeans, and the contrary impracticable; nor can the latitude be so well laid down in that wild country, the Indians well knowing the one, but not the other.

But should the French refuse the limits now proposed by the company, the company think themselves not bound by this or any former concessions of the like nature, but must, as they have always done, insist upon their prior and undoubted right to the whole Bay and Straits of Hudson, which the French never yet would strictly dispute, nor suffer to be examined into (as knowing the weakness of their claim), though the first step in the said Article of Ryswick directs the doing of it,

By Order of the General Court of the said Company.

WM. POTTER.

January 29th, 170⅘. *Secretary.*

Albany and the East Main being the southern boundary—"proposed by the Hudson's Bay Company, 29th January, 1701," and another line, that of the Albany and Rupert, marked "Southern boundary proposed by Hudson's Bay Company, 10th July, 1700."

Mr. McCarthy.—Those are the very documents we are now at.

The Lord Chancellor.—You are now reading from documents in 1700 and 1701?

Lord Aberdare.—But you proceeded to say that neither then nor afterwards was there anything to justify the award.

Mr. McCarthy.—I say these are the only documents.

The Lord President.—These documents carry the French up to the Albany River.

Mr. McCarthy.—All south of that line the Hudson's Bay Company proposed for the French. They said, we do not want the French to come north of it, and we will not go south. What I say is, that those are the only documents, first to last.*

The Lord Chancellor.—These may be the only documents, first or last, but we should like to understand what these documents are.

Mr. McCarthy.—They are on pages 562-3:

"The Company's Claims after the Treaty of Ryswick.

"The limits which the Hudson's Bay Company conceive to be necessary as boundaries between the French and them, in case of an exchange of places, and that the Company cannot obtain the whole straits and bay, which of right belongs to them, viz:"

It is a document without prejudice—

"That the French be limited not to trade, by wood-runners or otherwise, nor build any house, factory or fort beyond the bounds of 53 degrees, or Albany River, vulgarly called Chechewan, to the northward, on the west main or coast."

The Lord Chancellor.—I see by the map that that name was also the name of the fort built in 1684 at the mouth of the Albany River.

Mr. McCarthy.—The first forts built there were by the English,† then the French took them, then the English retook them, then the Treaty of Ryswick was passed, which said that notwithstanding the English had captured them nevertheless they ought to be returned to the French, although they had been taken from the English by the French during the peace, and therefore the Hudson's Bay Company said they were "the only mourners by the peace." Then the second paragraph says:

"That the French be likewise limited not to trade, by wood-runners or otherwise, nor build any house, factory or fort beyond Rupert's River, to the northward, on the east main or coast. On the contrary, the English shall be obliged not to trade, by wood-runners or otherwise, nor build any house, factory or fort beyond the aforesaid latitude

* These documents, emanating from the company itself, *conceded* to the French the line of the Albany and East Main rivers, but that they were the only documents that gave "colour of foundation" to the award of the arbitrators, was so little the case, that they may looked upon as not having formed even an element in the evidence upon which the decision of what was Ontario's right was arrived at; at best they served but to suggest the actual lay, which might be conveniently followed, of a line already determined upon quite different considerations. The title of France did not depend upon any concession of the company, and that title passed not to the company but to the Crown of Great Britain—in part in 1713, in its entirety in 1763. And that was but one phase of the question, one branch of the argument. Subsequently came the Acts of the Parliament and of the Crown—the series of Orders in Council, Royal Proclamations, Commissions, and Instructions—which formed the actual basis of the award. (See *ante*, p. 12, note †, p. 190, note †.)

† The first forts north of the height of land were built by the French. See, as to those on the Rupert, Moose, Abbitibi, Albany and Nelson Rivers, *ante*, p. 200, note *. See, also, appendix B, hereto.

of 53 degrees, or Albany River, vulgarly called Chechewan, south-east towards Canada, on any land which belongs to the Hudson's Bay Company"—

treating it still as their land:

"As also the English be likewise obliged not to trade, by wood runners or otherwise, nor build any house, factory or fort beyond Rupert's River, to the south-east towards Canada, on any land which belongs to the Hudson's Bay Company."

It is only regulating trade, after all; there is no surrender of territory.

Sir ROBERT COLLIER:

"As likewise that neither the French or English shall at any time hereafter extend their bounds contrary to the aforesaid limitations."

Mr. MCCARTHY.—Yes:

"Nor instigate the natives to make war, or join with either, in any acts of hostility, to the disturbance or detriment of the trade of either nation, which the French may very reasonably comply with, for that they by such limitations will have all the country south-eastward, between Albany Fort and Canada, to themselves, which is not only the best and most fertile part, but also a much larger tract of land than can be supposed to be to the northward."

The LORD PRESIDENT.—I see these are the limits which the Hudson's Bay Company conceived to be necessary as boundaries in case of an exchange of places.

Mr. MCCARTHY.—Yes:

"And unless the company can be secured according to these propositions, they think it will be impossible for them to continue long at York Fort (should they exchange with the French), nor will the trade answer their charge, and therefore if your Lordships cannot obtain these so reasonable propositions from the French—"

Your Lordships see it was to the Lords Commissioners of Trade and Plantations:

—"but that they insist to have the limits settled between York and Albany Fort as in the latitude of 55 degrees or thereabouts, the company can by no means agree thereto, for they by such an agreement will be the instrument of their own ruin never to be retrieved."

The LORD CHANCELLOR.—I see it is Fort York, or Fort Nelson.

Mr. MCCARTHY.—Yes. I omitted to read the last part of paragraph 5. Your Lordships will observe, in the first place that this is a proposition made to the Lords Commissioners of Trade and Plantations.

Sir ROBERT COLLIER.—There we have the precise boundary which they claimed at this particular time, 10th July, 1700.

Mr. MCCARTHY.—Not what they were claiming, but what they were willing, for the sake of peace and settlement, to accept.

Sir ROBERT COLLIER [*referring to the Ontario boundary map*].—It is called "Southern boundary proposed by H. B. Co., 10th July, 1700." Then, later, they go a little higher and there is "Southern boundary proposed by H. B. Co., 29th January, 1701."

Mr. MCCARTHY.—I find no authority for that line on the map.* If you look at paragraph 5, you will see what the company say further, line 31:

"Which is not only the best and most fertile part, but also a much larger tract of land than can be supposed to be to the northward, and the company deprived of that which was always their undoubted right."

* There is authority for the line, viz., the company's memorial of the particular date, *ante*, p. 207, note.

Now they speak of their right, and make a proposition for settlement to their own government, and not to the French.

Sir MONTAGUE SMITH.—They wanted their own government to get that boundary settled.

Mr. MCCARTHY.—I say this never was communicated to the French.

The LORD CHANCELLOR.—What does that signify?

Mr. MCCARTHY.—Perhaps not; I only stated the fact.

The LORD CHANCELLOR.—There have been many documents which do not seem to have been communicated, which have been referred to as shewing what the claims or pretensions of particular parties were at different times.

Mr. MCCARTHY.—I thought I had read the part which made it very clear that they claimed all, but were willing to make concessions for the sake of peace.

The LORD CHANCELLOR.—You have read enough to shew that they do not necessarily admit by this that they are conceding something to which they made no claim. It does not go further than that.

Mr. MCCARTHY.—They do say, "and the company deprived of that which was always their undoubted right." They speak of their right, and make a proposition for settlement to their own government, and not to the French. I do not know what stronger words could be used.

Sir ROBERT COLLIER.—And they also say that they claim the whole Straits and Bay.

The LORD CHANCELLOR.—They seem to admit by this, that looking to the actual state of occupation and possession, that would be a limitation of boundaries in which they would acquiesce.

Mr. MCCARTHY.—If that settlement had been carried out at that time, they would be willing to acquiesce. That came to nothing. It was a proposition made by them, not communicated to the French or which, if it was communicated to the French, was never agreed to, and therefore it was like a proposition made without prejudice, and of course is not to be used against them in any sense.

Then, if your Lordships care to follow this further, I may state I have gone carefully through it, and I think I can state the effect of it, that nothing came of all this correspondence. I merely referred to this because I thought it ought to be explained to your Lordships, and it would hardly have been candid to your Lordships if I had passed it over.

The Treaty of Ryswick was followed rapidly by the outbreak of war between France and England, which ended in the Treaty of Utrecht. By that treaty the Treaty of Ryswick was wiped out, and the English and Hudson's Bay Company restored to all their rights.*

The LORD CHANCELLOR.—There is a paragraph at the bottom of page 564†

* Ontario claimed that the Treaty of Utrecht could not enure to the benefit of the Hudson's Bay Company, for the reasons set out *ante*, p. 190, note †.

†MEMORIAL OF THE HUDSON'S BAY COMPANY TO THE LORDS COMMISSIONERS FOR TRADE AND PLANTATIONS, 19 JANUARY, 1702. [Extract.]

[They] shall proceed to inform your Lordships of the present melancholy prospect of their trade and settlement in Hudson's Bay, and that none of His Majesty's plantations are left in such a deplorable state as those of this company, for by their great losses by the French, both in times of peace as well as during the late war, together with the hardships they lie under by the late Treaty of Ryswick, they may be said to be the only mourners by the peace.

They cannot but inform your Lordships that the only settlement the company have now left in Hudson's Bay (of seven they formerly possessed) is Albany Fort, vulgarly called Checheawan, in the bottom of the said Bay, where they are surrounded by the French on every side, viz., by their settlements on the lakes and rivers from Canada to the northwards, towards Hudson's Bay, as also from Port Nelson (Old York Fort) to the southward; but beside this, the company have, by the return of their ship this year, received certain intelligence that the French have made another settlement at a place called New Severn, 'twixt Port Nelson and Albany Fort, whereby they have hindered the Indians from coming to trade at the company's factory, at the bottom of the Bay, so that the company this year have not received above one-fifth

shewing exactly the state of things, right or wrong, where the Hudson's Bay Company state:

"That the only settlement the Company have now left in Hudson's Bay (of seven they formerly possessed) is Albany Fort, vulgarly called Checheawan, in the bottom of the said bay, where they are surrounded by the French on every side, viz., by their settlements on the lakes and rivers from Canada to the northwards, towards Hudson's Bay, as also from Port Nelson (Old York Fort) to the southward."

Mr. McCARTHY.—I do not know to what extent that statement is right, but they (the French) had a settlement on the Albany River, and they had that settlement on Lake Abbitibi, which is to the north of Lake Temiscanning. When they say settlement, it does not mean a settlement of cultivated land, but a post from which they traded, and where they had fortifications. I think they had posts at both those places, on the Albany River and at Lake Abbitibi.

Lord ABERDARE.—Your argument would be, that their settlement there would no more entitle them to the territory than their settlement to the north would entitle them to the land to the north.

Mr. McCARTHY.—In the negotiations for the peace of Utrecht, the English insisted on having the cannon, and a good deal of discussion took place as to the words "restitution" and "cede," and one of the points was, that if it had been a cession, the French would have right to withdraw their ordnance and their public property. If, on the other hand, it was restitution, the cannon and the public property went to the conqueror. Then, in view of the Treaty of Utrecht, the war having occurred in 1702, and having continued to 1713, I think, if your Lordships will look at page 572, in view of the negotiations then pending for peace, the Hudson's Bay Company presented their claim to the Queen,* and that states—

part of the returns they usually had from thence, insomuch that the same doth not answer the expense of their expedition.

The company, being by these and other their misfortunes reduced to such a low and miserable condition, that, without His Majesty's favour and assistance, they are in no ways able to keep that little remainder they are yet possessed of in Hudson's Bay, but may justly fear in a short time to be deprived of all their trade in those parts, which is solely negotiated by the manufacturers of this kingdom.

* The Company's petition to Queen Anne, 1711, whose admissions are so important that it may be well to group them here in one view:—

[Extracts.]

That the French, in a time of perfect amity between the two kingdoms, viz., Anno 1682, did arbitrarily invade the company's territories at Port Nelson, burn their houses and seize their effects.

That in the years 1684 and 1685, they continued their depredations.

That in the year 1686, they forcibly took from the company three factories, viz.: Albany Fort, Rupert and Moose River Fort, which violent proceeding they continued the years 1687 and 1688, the whole damages done by the French to the company in times of peace amounting to £108,514 19s. 8d. as your petitioners are ready to make appear, besides interest for the same. * * * *

But so it is, may it please your most Excellent Majesty, that the company found their interest not comprehended in the Treaty of Ryswick which they are far from attributing to any want of care in that gracious Prince of this Kingdom's honour and trade, and rather think their rights and claims were then overweighed by matters of higher consequence depending in that juncture; for by the said treaty they found their condition much worse than it was before,—by the 8th article whereof, the French were left in possession of such places situated in Hudson's Bay, as had been taken by them during the peace which had preceded that war.

That at a meeting of Commissioners on both sides (as directed by the said treaty, to adjust these differences) the company did again set forth the undoubted right of the Crown of England to the whole Bay and Streights of Hudson, against which nothing but sophistry and cavils were offered on the French side, and the matter remained undetermined.

That the only settlement now remaining to the company in those parts (of seven they formerly had) is Albany Fort, on the Chechewan, where they are surrounded by the French on every side, viz.: By their settlements on the lakes and rivers from Canada to the northward towards Hudson's Bay, as also from Port Nelson (alias York Fort), to the southward. The French have likewise made another settlement between Port Nelson and Albany Fort, whereby the Indians are hindered from coming to trade with the English factory at the bottom of the Bay, and if they are suffered to fix and fortify in those parts, beyond all question they will deprive your Majesty's subjects of that tract of land, which is so large a part of your American dominions, and rightly belongs to the Crown of Great Britain. * * * *

That the said country doth abound with several other commodities (of which your petitioners have not been able to begin a trade, by reason of the interruptions they have met with from the French), as with

"That the French, in a time of perfect amity between the two kingdoms, viz., anno 1682, did arbitrarily invade the company's territory at Port Nelson, burn their houses, and seize their effects. That in the years 1684 and 1685, they continued their depredations. That in the year 1686, they forcibly took from the company three factories, viz., Albany Fort, Rupert and Moose River Fort, which violent proceeding they continued the years 1687 and 1688, the whole damages done by the French to the company in times of peace amounting to £108,514 19s. 8d., as your petitioners are ready to make appear, besides interest for the same. That in the year 1685, they supplicated his then Majesty, King James the Second, to interpose on their behalf, and, by his ambassadors at the French Court, to demand reparation for the damages done to the company, and restitution of the places unjustly taken from them by the French in time of peace."

That is a repetition of what your Lordships have heard. Then, they talk, on page 573, about the Peace of Ryswick:

"But so it is, may it please Your Most Excellent Majesty, that the company found their interest not comprehended in the Treaty of Ryswick, which they are far from attributing to any want of care in that Gracious Prince [the late King William], of this kingdom's honour and trade, and rather think their rights and claims were then overweighed by matters of higher consequence depending in that juncture; for, by the said treaty, they found their condition much worse than it was before, by the 8th Article whereof the French were left in possession of such places situated in Hudson's Bay, as had been taken by them during the peace which had preceded that war. That at a meeting of Commissioners on both sides (as directed by the said treaty, to adjust these differences), the company did again set forth the undoubted right of the Crown of England to the whole Bay and Straits of Hudson, against which nothing but sophistry and cavils were offered on the French side, and the matter remained undetermined."

Sir MONTAGUE SMITH.—The whole bay and straits?

Mr. MCCARTHY.—That is used, as I submit, shortly to indicate or imply their right to the whole country:

"That the only settlement now remaining to the company in those parts (of seven they formerly had) is Albany Fort, on the Chechewan, where they are surrounded by the French on every side, viz, by their settlements on the lakes and rivers from Canada to the northward, towards Hudson's Bay, as also from Port Nelson (alias York Fort) to the southward."

They then speak of the former treaty, and your Lordships have heard that. Then:

"The premises considered, when Your Majesty in your high wisdom shall think fit to give peace to those enemies whom your victorious arms have so reduced and humbled, and when Your Majesty shall judge it for your people's good to enter into a treaty of peace with the French king, your petitioners pray that the said prince be obliged by such treaty to renounce all right and pretensions to the Bay and Straits of Hudson, to quit and surrender all posts and settlements erected by the French, or which are now in their possession, as likewise not to sail any ships or vessels within the limits of the

whale-oil, whale-bone, (of which last your subjects now purchase from Holland and Germany, to the value of about £26,000 per annum, which may be had in your own dominions) besides many other valuable commodities, which in time may be discovered. * * * *

That if the French could pretend to any right to the said territories by the peace of Ryswick, this right must needs be determined by their notorious infraction of the said treaty.

The premises considered, when your Majesty, in your high wisdom, shall think fit to give peace to those enemies whom your victorious arms have so reduced and humbled, and when your Majesty shall judge it for your people's good to enter into a treaty of peace with the French King, your Petitioners pray that the said Prince be obliged by such treaty, to renounce all right and pretensions to the Bay and Streights of Hudson, to quit and surrender all posts and settlements erected by the French, or which are now in their possession, as likewise not to sail any ships or vessels within the limits of the company's charter, and to make restitution of the £108,514, 19s. 8d., of which they robbed and despoiled your petitioners in times of perfect amity between the two Kingdoms.

company's charter, and to make restitution of the £108,514 19s. 8d., of which they robbed and despoiled your petitioners in times of perfect amity between the two kingdoms."

And virtually that prayer was acceded to.

Sir MONTAGUE SMITH.—"The Bay and Straits of Hudson" again.

Mr. MCCARTHY.—Yes. They never set out the words of the charter in full, but it does appear from the Ryswick treaty, which was referred to a moment ago, that they meant the land, because they speak of their land, and they speak of more valuable land being given to the French by that proposition they then propose to make than they were retaining.

The LORD CHANCELLOR.—Then, there is a new proposition* in 1712. What is the bearing of that?

Mr. MCCARTHY.—I do not know that that varies anything that I have read. It is a proposition as to limits.

The LORD CHANCELLOR.—Where is Grimington's Island?

Mr. MCCARTHY.—To the north-east, on the coast of Labrador.

The LORD PRESIDENT.—That would be taking the French out of the bay altogether.

Mr. MCCARTHY.—They proposed, before the Treaty of Utrecht, a line of demarcation between the two provinces, and your Lordships will find that on the map, marked substantially in accordance with the height of land:

"That the said limits begin from the island called Grimington's Island, or Cape Perdrix, in the latitude of 58½ north."

Sir ROBERT COLLIER.—That is very far north.

Mr. MCCARTHY.—On the coast of Labrador.

The LORD CHANCELLOR.—Nobody could possibly say that that would coincide with the height of land.

Mr. MCCARTHY.—I was wrong in saying that it corresponded: it is a line drawn below †

The LORD CHANCELLOR.—This line is quite on a different part of hills.

Mr. MCCARTHY.—The height of land in this part runs up north-easterly. It is not at all in the same direction.

The LORD CHANCELLOR.—I have the "Boundary proposed by the Hudson's Bay Company in 1712." About the middle of its course there is some large river running into Ungava Bay, which is inconsistent with the height of land or the watershed having anything to do with that territory. It may be immaterial for our present purpose.

Mr. MCCARTHY.—It is, in this sense. I made a mistake in supposing it was the height of land. It is the line below that, which goes to Davis' Inlet.

The LORD CHANCELLOR.—That seems to cross the water not far from the sources of the River Canuse.

Mr. MCCARTHY.—That is virtually the height of land line; it is not a straight line.

The LORD CHANCELLOR.—Not only not a straight line, but this on the face of the map goes across the water.

*Memorandum of the company to the Lords Commissioners of Trade and Plantations, 7 February, 1712, (Joint App., p. 574), proposing for limits a line beginning at Grimington's Island, or Cape Perdrix, in 58½°, on the coast of Labrador, and passing to the south-westward, to Lake Mistassin, "dividing the same into two parts." Nothing is said as to its further extension, but it is claimed that the French should deliver up all forts, settlements, etc., "within the limits aforesaid, or within the Bay and Straits of Hudson."

†The two lines here discussed are those set down upon the Ontario Government map of 1884 as (1) "Boundary proposed by the Hudson's Bay Company in 1712," running from Lake Mistassin to Grimington's Island or Cape Perdrix, and (2) "Boundary proposed by the English Commissaries under the Treaty of Utrecht, 1719," running from the same lake to the north cape of Davis' Inlet, on the Labrador coast.

Mr. McCarthy.—If your Lordship looks at the height of land, you will find it is as near a straight line as can be.

Sir Robert Collier.—The height of land would not be straight.

Mr. McCarthy.—No, but the line proposed by the second document I mean.

The Lord Chancellor.—That is exactly the same line as the "Boundary proposed by the English Commissaries under the Treaty of Utrecht, 1719." The general tendency of the line seems no doubt to be much in accordance with your view, but at that particular part of it I do not think it is, and that is not an unimportant thing. If this is relevant to the present controversy, it shews that they are not to take too little.

Mr. McCarthy.—The answer to that is this, that they did not exactly know where the water line was. What I say to that, my Lord, whether rightly or wrongly, is this, that they did not pretend to survey the water line.

Lord Aberdare.—They go to the Lake Miscosinke, which is pretty nearly the water line.

Mr. McCarthy.—Of course, I do not mean to say that they found out exactly the line of the water line, but they adopt the general course of the water line in the subsequent correspondence, although not in this.*

The Lord President.—I think in this memorandum, the Hudson's Bay Company call attention to the fact of their charter.

Mr. McCarthy.—Yes, in the company's memorandum of 7th February, 1712; it commences at page 574:

"That the said limits begin from the island called Grimington's Island, or Cape Perdrix, in the latitude of 58½ north, which they desire may be the boundary between the English and French, on the coast of Labrador, towards Rupert's Land, on the east main, and Nova Britannia on the French side, and that no French ship, bark, boat, or vessel whatsoever, shall pass to the northward of Cape Perdrix or Grimington's Island, towards or into the Straits or Bay of Hudson, on any pretence whatever.

"That a line be supposed to pass"—

"Supposed to pass" is the way they put it.

Lord Aberdare.—From that point it goes down to Lake Miscosinke.

Sir Robert Collier.—It takes you down to that?

Mr. McCarthy.—Yes my Lord.

Lord Aberdare.—And then it goes on further.

Mr. McCarthy.—Yes: "dividing the same into two parts (as in the map now delivered)."

The Lord Chancellor.—I suppose you have not got that map?

Mr. McCarthy.—No, my Lord. Afterwards, this becomes important. I think it is proper to refer to it, but afterwards the line is laid down on the 49th parallel. That is where we get the 49th parallel afterwards.

Sir Robert Collier.—Then, they say that the French boats shall not come "to the north or north-westward of the said lake, or supposed line;" that is to say, that the French are not to go northward of this Lake Miscosinke.

Mr. McCarthy.—That comes afterwards, after the treaty of Utrecht.

Sir Robert Collier.—What they say is, that the French boats shall not come to the northward or north-westward of the said Lake Miscosinke.

Mr. McCarthy.—That is the proposition. That is the memorandum prepared by the company, and suggested to the Lords Commissioners of Trade and Plantations,

Lord Aberdare.—These are intermediate negotiations?

*Neither of the two lines discussed is confined to the watershed of Hudson's Bay and Straits. They pass beyond, through the height of land, and, by another water system, to the Atlantic coast of Labrador.

Mr. McCarthy.—These are before the peace. These are not negotiations at all, strictly so called. While negotiations for the peace were going on, the Hudson's Bay people proposed to the English negotiators to have that line established.

Sir Robert Collier.—That is the line that they claimed at that time?

Mr. McCarthy.—That is the line they claimed on that side:

"These limits being first settled and adjusted, the company are willing to refer their losses and damages formerly sustained by the French in time of peace, to the consideration of commissioners to be appointed for that purpose."

Then they go on:

"The said company are by their charter, constituted lords proprietors of all those lands, territories, seas, straits, bays, rivers, lakes and sounds, within the entrance of the Straits; to hold the same as of Her Majesty's manor of East Greenwich, in the County of Kent."

That means, I take it, that they take the whole from the entrance of the Straits of Hudson, and all the lands drained by the tributaries to that. That is their claim. Your Lordships will find that pretty plain when we go on, step by step. Of course, the land was not of so much importance then as the trade.

The Lord Chancellor.—You are going through the detail of these negotiations, and it may be that it is necessary that you should do so, but as far as I can make out, the result of it seems to be this, that from time to time various boundaries were proposed, none of which exactly refer to or coincide with the watershed, and that no boundary was finally settled. Is not that it?

Mr. McCarthy.—That is just what I am coming to, but I think it is only fair to point out these negotiations, because they are rather against the view which I am contending for, and I shall have no opportunity of replying in case any statement may be made by my learned friends on the other side, if they advance anything upon them. Then there follows, what I was very nearly omitting, the report of the Lords of Trade to the Earl of Dartmouth,* at page 575:

"In obedience to Her Majesty's commands, signified to us, we have considered the enclosed petition from the Hudson's Bay Company to Her Majesty, and are humbly of opinion that the said company have a good right and just title to the whole Bay and Straits of Hudson."

Sir Montague Smith.—That seems to be the phrase adopted at that time all the way through—the "Bay and Straits."

Mr. McCarthy.—Yes. In point of fact, I am inclined to think that the clearer view of international law, as it is now understood, was on the French side—as to the watershed I mean—as far as I can gather from the correspondence.

The Lord Chancellor.—Surely there is no international law involved in the subject?

Mr. McCarthy.—I propose, my Lord to cite authorities from writers on international law, in support of that view, such as Phillimore.

The Lord Chancellor.—It may be that the French had no abstract right to the possession of these territories.

Mr. McCarthy.—But I mean with reference to how these matters, with regard more especially to the American continent, were settled; because they required to be settled.

The Lord Chancellor.—That is a matter of history rather than international law.

* Report dated 19th February, 17$\frac{1}{2}$

Mr. McCarthy.—These pretensions were advanced at one time by the Spaniards, in the cession of their territories; they were advanced at another time in disputes between France and England, and between England and the United States; and I would submit that there is now a rule of international law derivable from what was done on those occasions, and in that sense it is that I say that questions of international law are involved.

The Lord Chancellor.—If you mean that every treaty and convention may be said to enter into international law, of course I follow what you mean.

Lord Aberdare.—Will you go on to what was the result of all this?

Mr. McCarthy.—The result of all this was the Treaty of Utrecht, in which no lines were fixed; but your Lordships will remember my argument on the subject.

Now then, coming to that point again, if your Lordships will pardon me for recurring to it, I say, looking at what your Lordships now know more accurately than you could from my statement—what is the fair meaning of that treaty? Two things are proved, as I say, first, a rule of division, a rule by which the commissioners were to divide the provinces, for I will so continue to call them, of Hudson's Bay* and French Canada. The rule provided for their division was, that the commissioners were not to meet and settle that great question, which no doubt caused a good deal of trouble, but that that was already determined under the 10th article of the treaty. And how was it determined? Now it requires a great deal of hardihood, after the way my argument was received by your Lordships the other day, to repeat it, but I ask your Lordships again, what is the fair meaning of the words, when you speak of land and territory looking to water?

Lord Aberdare.—"Looking to" is your translation of the original words of the treaty, "*spectantibus ad eadem?*"

Mr. McCarthy.—That is what I say.

Sir Robert Collier.—Then, in the French copy, the word is "*dependent*," or "appurtenant."

The Lord Chancellor.—Everybody knows that the Latin word is capable of that sense.

Mr. McCarthy.—Is not that the fair meaning of that word, when you speak with regard to land looking towards the water? What does it mean if you speak of the land looking to the Thames? Would not any one say that that was the part of the property that sloped towards the Thames?

Lord Aberdare.—What is the primary meaning of the word "*spectantibus?*" I suppose the ordinary meaning of "*spectantibus*" is "relating to?"

The Lord President.—The French version is the original one.

Mr. McCarthy.—No, my Lord.

The Lord President.—Well, it is stated that there were two originals.

Mr. McCarthy.—But the English government directed their commissioners to be guided by the Latin, and not by the French version.

The Lord Chancellor.—Where is the treaty to be found?

Mr. McCarthy.—At page 504 is the treaty.†

Sir Montague Smith.—The note‡ says there were two originals.

Mr. McCarthy.—Your Lordship is quite right. Now what say the instructions to the commissioners, at page 509, if your Lordships will turn to that for a moment.

The Lord Chancellor.—Before we pass from that, let me say—

* It would, to say the least of it, be difficult to discover any grounds upon which the uncertain territories of the Hudson's Bay Company could be held entitled to be dignified with the title of Province. Even as recently as in our own day, they were transferred to the Dominion as unorganized tracts, and were thereafter, without separate identity, officially known as a part of the North-West Territories.

† Printed *ante*, p. 112. ‡ *i.e.*, the sub-note*, *ante*, p. 112.

Mr. McCarthy.—I am coming back to it, my Lord, but I want just to refer to this page 509, because there you will find the instructions to commissioner Bladen, in 1719, about this treaty :

"If the French commissary or commissaries should pretend to ground a more extensive claim upon the French treaty than does appertain to them by the Latin one, you are to insist upon it that the Latin treaty is to be your guide in all cases, though even by the French treaty they can have no title to any islands lying in the Bay or Gut of Canceau."

The Lord Chancellor.—You see, here you want to impose on the Latin word a sense which it does not necessarily bear, and which, in the contemporaneous translation, both of the English government and of the French government, was not given to it.

Mr. McCarthy.—I just wasn't, if your Lordship will pardon me for perhaps undue persistence upon this point—

The Lord Chancellor.—Both the contracting parties agreed to it in the sense in which the word is used in the English.

Mr. McCarthy.—That is not signed in English ; the English is a translation.

The Lord Chancellor.—The English is a contemporaneous translation, accepted by the government, and made by the authority of the English government at the time.

Mr. McCarthy.—But what can possibly be the meaning of these words as applied to land, when you speak of looking to certain rivers! Your Lordships will see what he says: "together with all lands, seas, sea coasts, rivers and places situate in the said bay and straits"—looking towards the said bay and straits. Now what can that mean ?

The Lord Chancellor.—But you insist on imposing on the word that literal construction which both the contracting parties at the time rejected.

Mr. McCarthy.—Then, my Lord, let me take the other words—"and which belong thereunto."

The Lord Chancellor.—It may be either those words, or the French words.

Mr. McCarthy.—But my Lords, have not I a right to quote the Latin, when I have the instructions to the English commissaries, saying, if there is a difference between the French and the Latin, you are to take the Latin.*

The Lord Chancellor.—We know the English interpretation does not, nor does the French, give the meaning you seek to impose on the words.

Mr. McCarthy.—It was a translation, not signed by the parties.

The Lord Chancellor.—The note† says—which note I suppose you agreed upon—"This translation is that published by authority of the English government at the time."

Mr. McCarthy.—Then I will take the words of the treaty: "and which belong thereunto." What can that mean ? According as I understand, land is never said to belong to streams or rivers. If you are speaking of a river belonging to a country, it is because the river flows through a country, and the land is owned by that state. You do not, as a usual thing, speak of land appertaining to a river, or belonging to a river. Rivers, on the contrary, (and I am quoting from a high authority) are spoken of as being dependent on the ownership of the soil, so that when you say, "which belong thereunto," I do not know that there is any great difference in the meaning.

* The Latin and French texts were not, upon this point, really at variance ; and their Lordships so decided. Besides, the French, as the power having to make sacrifices, would have had the right to take their stand upon the instrument, and upon the interpretation, most favourable to their interests. (Vattel, Book 4, sec. 32).

† Namely the note appended to Article X. of the Treaty, at p. 504 of the Joint Appendix. It is reproduced *ante*, p. 112, as sub-note *.

The Lord President.—There is no question about belonging to a river; but it is belonging to "the said Bay and Straits."

Mr. McCarthy.—But the same thing applies. How would you define that? Supposing a person called upon you to fix the limits of land "which belongs to the Hudson's Bay"—how can you define it? And should you go ten miles, or fifty miles, or two hundred miles back, or should you go back to a defined line, or what are you to do? Does not the Latin supply the answer, that you are to go to that line which is looking, or sloping, towards this bay or river?

Lord Aberdare.—That is not the ordinary use of the word *spectantibus*.

Mr. McCarthy.—No; but "looking toward" would be one use.

Sir Montague Smith.—But rivers wind, and the land looks towards rivers in all sorts of ways, and that, therefore, can hardly be the proper meaning of *spectantibus*.

The Lord President.—My impression is that the English words convey the meaning, and that there is no need to argue about the meaning of *spectantibus*.

Mr. McCarthy.—Very well, my Lord.

Mr. Mowat.—It would be convenient, perhaps, to mention that the meaning of this word *spectantibus*, as given in Rolls Abridgement, 95 E., is identical with "appurtenant" or "appertaining." That is in a grant to the Duchy of Cornwall.

Mr. McCarthy.—The Latin dictionary I have looked at gave the meaning of the word, when used with regard to land, as being "looking to."

Mr. Scoble.—The primary meaning of the word is to "appertain to" or "relate to."

The Lord Chancellor.—Every schoolboy knows that.

Mr. McCarthy.—Then if we go to page 575, your Lordship will find the company's petition for an act of cession. My learned friend advanced an argument the other day, that although this land was restored by the Treaty of Utrecht, and this territory was the same that was restored to the crown, that it did not enure to the benefit of the company.

The Lord Chancellor.—You need not trouble yourself about that.

Mr. McCarthy.—That is all that that shews; that it was so, and the following pages make that out. They pray that the land be restored to them.

Now, we come to the negotiations under the treaty, and I may state briefly to your Lordships what I think those shew, so far as it is necessary for the purposes of this case.

Lord Aberdare.—What treaty do you mean?

Mr. McCarthy.—Under the Treaty of Utrecht, in 1719. Your Lordships will remember, that now there was a long peace, from 1713 up to 1746, and in 1719 commissaries were appointed, under this treaty, to mark out this line provided by the treaty. But, before I pass from the treaty, I want just to draw your Lordships' attention to this. I stated this as a fact, but I thought perhaps your Lordships might have thought it was my argument, and not the statement of the treaty itself. It says:

"But it is agreed, on both sides, to determine within a year, by commissaries to be forthwith named by each party, the limits which are to be fixed between the said Bay of Hudson and the places appertaining to the French, which limits both the British and French subjects shall be wholly forbid to pass over, or thereby to go to each other by sea or by land. The same commissaries shall also have orders to describe and settle, in like manner, the boundaries between the other British and French colonies in those parts."

That appears to me to strengthen the argument that it was not intended to leave the commissioners to do more than just mark down some line, the principle on

which that line was to be marked being already determined. And the object is also apparent. It is to present an absolute wall—a sort of Chinese wall—over which the French were not to go, and below which the English were not to go. And the purpose is obvious, when we have regard to the trade which was carried on. By coming up, and interfering with one another's rivers, they were interfering with the trade, which went on one side to Montreal, and on the other side to Hudson's Bay.

The LORD CHANCELLOR.—They are

—"to determine, within a year, by commissaries to be forthwith named by each party, the limits which were to be fixed between the said Bay of Hudson and the places appertaining to the French."

Your argument is, that nature had determined that, and that they were only to go along the line of the hills, or where they found the water divided by hills?

Mr. MCCARTHY.—No, my Lord, that is not quite so; I have not made myself understood. My argument was, that as a matter of public law, even as understood in those days, the Hudson's Bay province* was bounded by that watershed on the one side, and equally so was the French province bounded by it on the other; that that principle, which had been disputed up to that time by the two governments, was practically adopted by the Treaty of Utrecht, and then it would be an impossible thing—when I say impossible I mean relatively, with reference to the expense—to have gone and traced the line of this watershed all through this great continent, which was a savage wilderness, and therefore they were to determine some convenient line, which was to be the line of demarcation between them. That is what I think the treaty says.

Sir MONTAGUE SMITH.—Which line need not be the watershed?

Mr. MCCARTHY.—It need not be the watershed.

Lord ABERDARE.—Then, to avoid all the trouble and expense, what really was proposed, as the exact line of demarcation, was that they should take a straight line, beginning at one point and ending at the other, in its place?

Mr. MCCARTHY.—Yes, my Lord.

The LORD CHANCELLOR.—Then, that may have been a perfectly rational proceeding, but at present I see no words which indicate one thing or the other?

Mr. MCCARTHY.—I need not repeat the argument, if your Lordship understands me; I cannot put it better than I have done.

The LORD CHANCELLOR.—That would seem to be somewhat important, if you could make it out; because, although these people did not do that which according to your view it was contemplated that they might do, yet, in the absence of a decision by these commissioners, the thing might have practically settled itself on the same footing.

Mr. MCCARTHY.—Yes, and I think it did. I think your Lordship will find that it was practically settled on the line of the 49th parallel.

Lord ABERDARE.—The proposition they put forward in 1712 is again renewed, at page 578, in 1714: but you say that they ultimately settled the line of the 49th parallel?

Mr. MCCARTHY.—Yes.† May I state briefly what I mean, because it will make the correspondence a good deal easier to understand?

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*See *ante*, p. 216, note*.

†Counsel is mistaken: that line was never settled as a boundary until, by the convention of 1818, it was fixed as "the line of demarcation between the territories of the United States and those of His Britannic Majesty . . . from the Lake of the Woods to the Stony Mountains." See *ante* p. 142, note‡; *post*, p. 222, note†: to which it may be added, that the French retained their posts to the northward of the height of land, and a frontier beyond the 49th parallel, up to the cession of Canada. See appendix B, hereto.

The LORD PRESIDENT.—Do I understand that your contention, that the water line or height of land was the original boundary of the Hudson's Bay Company's territories, is entirely derived from the words of the charter, namely, "all the lands and territories upon the countries," etc.?

Mr. MCCARTHY.—Yes, my Lord.

The LORD PRESIDENT.—It all depends upon them?

Mr. MCCARTHY.—Yes.

The LORD PRESIDENT.—Absolutely, does it?

Mr. MCCARTHY.—I think so; what I think is this, that all that the English owned, their Hudson's Bay Company were entitled to, as I stated on Thursday, in my first observation. The English being the first discoverers, were entitled to settle.*

The LORD PRESIDENT.—But the whole contention that there was a water line boundary—a boundary depending upon the height of the land—rests upon the words of the charter, "the lands upon," etc.?

Mr. MCCARTHY.—Practically it does;† but this ought to be added to qualify that—

Sir ROBERT COLLIER.—At what page is the charter?

Mr. MCCARTHY.—Page 341, it commences.‡ Now, then, what took place was this. Commissioners were appointed on both sides to fix this line. On the side of England, a line was put forward starting from Grimington's Island, or from Davis' Inlet, I am not sure which§—perhaps Davis' Inlet, which more corresponds to the height of this land—down to the Lake Miscosinke, and from there down to the 49th parallel, and then westward along the 49th parallel.

The LORD CHANCELLOR.—That will not have any reference whatever to the watershed?

Mr. MCCARTHY.—Pardon me; of course it is not the watershed, which is an irregular line, and, for the reason I have already advanced, would not be a line at all suitable to the state and condition of the country, but looking at that line on the map—Johnston's map—it would go and take all the watershed.‖

Lord ABERDARE.—How far westward did that go?

Mr. MCCARTHY.—I will point out afterwards that they went, as they claimed in those days, to the very sea. That was the claim advanced. The first territorial claim that the Hudson's Bay Company made, before they knew where the height of land ended, was to the Pacific Ocean.

The LORD CHANCELLOR.—I only want to see the bearing of it. I should think it is as clear as the daylight, that it had nothing whatever to do with the watershed line. It takes in, as the Hudson's Bay Company's, all the western side of the Rocky Mountains.

Mr. MCCARTHY.—The Rocky Mountains had not been discovered then.

The LORD CHANCELLOR.—That is very true, and therefore I say, that any such line, in the nature of things, could have nothing to do with the watershed line.

*Ontario shewed that there was no such discovery as entitled the English to an exclusive right of settlement; that on their part there was abandonment; that the French were, as a matter of fact, the first discoverers of the country, and from the side of the St. Lawrence; were the first to assert a title; and had prior and continuous possession. See *ante*, pp. 189, note ‡, 200, note *; also appendix B, hereto.

† As to the height of land theory, see *ante*, p. 191, note ‡, and pp. 216, 217, text.

‡ Printed *ante*, p. 51.

§ The English commissaries were required by their instructions to demand the line from Grimington's Island, in lat. 58½° north; but the demand they actually made, in the document transmitted to the French commissaries, was of the line from Davis' Inlet, in lat. 56½°. (Joint App. 508, 511).

‖ Not at all: the 49th parallel, though at some points far to the south, is at others far to the north of the height of land.

Mr. McCARTHY.—What I say is this—supposing they knew where the water line was, as the maps shew they did, and assuming still further, as another factor of the argument, that they agreed it would be impossible to follow that irregular water line—that the 49th parallel is a fixed line, and I think as fair a line as could be assumed. That is all I mean to say. Not that it was the water line by any means, but looking at that 49th line, and looking at what we know to have been the supposed height of land in those days—because they did know there was a height of land, and they did mark it down on their maps, and the French maps put in by my friends, drawn before the charter was granted, shew the height of land—

Lord ABERDARE.—Was this 49th line ever accepted?

Mr. McCARTHY.—There is a good deal to be said about that.*

The LORD PRESIDENT.—Where is the Treaty of Utrecht printed?

Mr. McCARTHY.—At page 504.†

The LORD CHANCELLOR.—Where are the proposals of the company?

Mr. McCARTHY.—I am just coming to them, my Lord. That of 1719 is at page 579: "That at the treaty concluded at Utrecht it was agreed between the Crowns of Great Britain"—

Sir ROBERT COLLIER.—This is the memorial of the company?

Mr. McCARTHY.—The memorial of the company to the Lords Commissioners of Trade and Plantations:

"That at the treaty concluded at Utrecht it was agreed between the Crowns of Great Britain and France, that the Straits and Bay of Hudson should be delivered up to the British subjects, and that the limits should be settled between the said Bay of Hudson and the places appertaining to the French, and also that satisfaction should be given to the company for all depredations committed against them by the French in a time of peace, according to an estimate thereof to be made at the requisition of the several parties. Now, may it please your Lordships: The first of these articles, the surrender of the straits and bay aforesaid, has been made according to the tenor of the treaty, at least in such manner that the company acquiesce therein, and have nothing to object or desire further on that head. The other two, viz, the running of a line between the English and French territories, and the making reparations to the company for their losses and damages, yet remain to be done. Whereupon, the Governor and Company most humbly present to your Lordships, that they conceive it absolutely necessary that the limits between the two nations be settled without delay, for that the French have, since the conclusion of peace, viz., in 1715, made a settlement at the head of Albany River, upon which very river our principal factory is settled"—

Lord ABERDARE.—You mean the mouth?

Mr. McCARTHY.—No; the source or head of the river: "At the head of Albany River, upon which very river our principal factory is settled." That is Fort St. Germain, your Lordship will see. It is not at the mouth. It was spoken of by them as being at the head.

Lord ABERDARE.—Do you think that is what they meant, Fort St. Germain?

Mr. McCARTHY.—Yes.‡

Sir ROBERT COLLIER.—Where is that? That is not the head of the river.

The LORD CHANCELLOR.—This says "since the conclusion of peace, viz., in 1715."

*The evidence established that the line of the 49th parallel never was accepted. See *ante*, p. 142, note ‡, p. 219, note †; *post*, p. 222, note †.

†See *ante*, p. 112.

‡Fort St. Germain was built on Lake St. Anne, on the Albany, and was in existence long before 1715. It is depicted by that name on the maps even as early as 1700. (Ont. App., p. 101). The original French post on that lake was established in 1673. See appendix B hereto.

Lord ABERDARE.—It may have been pulled down and rebuilt.

Mr McCARTHY.—It may have been. I do not remember any evidence that it was built in 1684. It is not at the mouth of the river.

Sir ROBERT COLLIER.—Nor is it at the source. It is neither the one nor the other.

Mr. McCARTHY.—I thought for the moment it was at the head.

Sir ROBERT COLLIER.—It is not at the head.

Mr. McCARTHY.—What I meant was, it was not at the mouth.

Lord ABERDARE.—What is the head?

Mr. McCARTHY.—One cannot say where the head is properly. It is the head of Albany River:

—"whereby they intercept the Indian trade from coming to the company's factories, and will in time utterly ruin the trade, if not prevented. It is therefore proposed and desired, that a boundary or dividend may be drawn, so as to exclude the French from coming anywhere to the northward of the latitude of 49, except on the coast of Labradore. Unless this be done, the company's factories at the bottom of Hudson's Bay cannot be secure, nor their trade preserved."

The 49th line would be practically the line we are contending for here. That was, as I pointed out to your Lordships, found within the last twenty years. A Committee of the United States Senate, or House, said, notwithstanding all that has been alleged against the adoption of the 49th parallel, they are still of opinion it was adopted by the commissioners.* However, I will not anticipate my argument upon that point. But it is the basis of everything that has happened on the continent; it is the basis of the north-westerly angle of the Lake of the Woods;† it is the basis of all the treaties between England and the United States. Of course I am only speaking of that part of the country.

Now we come to page 507: "Representation of the Lords of Trade respecting the powers and instructions of the English commissaries." Your Lordships will see the date of the last document I read, from the Hudson's Bay Company, was 1719. I am not quite sure the exact date of it is given. We have the exact date of this, viz., 26th August, 1719. This is a "Representation of the Lords of Trade respecting the powers and instructions of the English commissaries, 26th August, 1719: To their Excellencies the Lords Justices"—then they speak of the instructions:

"It was not in our power to give more despatch to this matter, by reason of the multiplicity of books and papers which were necessary to be read and well considered upon this subject, besides that we were obliged to consult with several persons, and to wait for such lights as the company of British merchants trading to Hudson's Bay, the African company, and several other parties concerned in the success of this negotiation, could give us touching their respective interests and demands, for which we have made the most effectual provision we could think of in Mr. Blader's instructions. We have perused and considered the several charters granted by His Majesty's Royal predecessors

* Their opinion was clearly wrong, it appearing by a mass of evidence printed in the Appendices, and largely quoted by the Attorney-General, in his argument (*ante*, pp. 115-120), that no limitary line on the north was ever agreed upon between the French and English.

† The "most north-western point" of the Lake of the Woods, mentioned in the Treaty of 1783 (*ante* p. 43, note) as the remotest point of the water communications through which the international line was drawn, was selected as being apparently—but erroneously, of course—the source of the St. Lawrence River (see *ante* p. 107, note), and without any reference to the 49th parallel. From that point the line was to proceed, according to the treaty, "on a due west course to the River Mississippi;" and only after it had been ascertained that the Mississippi would not be so intersected, was the parallel of 49° selected as the boundary beyond the meridian of the Lake of the Woods (Convention of 1818, Joint Appendix 550). It was so selected under the mistaken assumption, on the part of both the British and the American negotiators, that that parallel had been settled on by commissaries under the Treaty of Utrecht. (Greenhow's *History of Oregon*, 281 *et seq.*; Twiss' *Oregon Question*, 207 *et seq.*).

to the respective British colonies on the continent of America, from Hudson's Bay and Nova Scotia as far as the Bay of Mexico, of which many are very extensive, stretching from sea to sea, but as the French would not perhaps be determined by these authorities only, and since we have not hitherto been able to get such maps of the said plantations as may be depended on, or to obtain such further informations as might be required to support the right and title of His Majesty, or any of his subjects have, to places which the French possess, or pretend to, either on the back of the British plantations, or westward from New England down to the Gulf of Mexico, we thought it proper to leave out of Mr. Bladen's full powers that part of the tenth article which relates to a general settlement of the boundaries between the colonies of the two nations in America, and to restrain his commission to the boundaries of Hudson's Bay and Nova Scotia only, where we have proofs and authorities against which we think no exception can reasonably be made."

Then it goes on to say what else the instructions were. The instructions are at page 508, line 29:

"It being provided by the tenth Article of the Treaty of Utrecht, that the limits and boundaries between Hudson's Bay and the places appertaining to the French be settled by commissaries on each part, which limits both the British and French subjects shall be wholly forbid to pass over, or thereby to go to each other by sea or by land, you are to endeavor to get the said limits settled in the following manner, that is to say: That the same begin from the island called Grimington's Island, or Cape Perdrix, in the latitude of 58½ north, which the company desire may be the boundary between the British and French subjects on the coast of Labrador, towards Rupert's Land, on the East Main, and Nova Britannia on the French side, and that no French ship, barque, boat or vessel whatsoever, shall pass to the north-westward of Cape Perdrix, or Grimington's Island, towards or into the Straits or Bay of Hudson, on any pretence whatsoever. And further, that a line be drawn from the south-westward of the island of Grimington, or Cape Perdrix, (so as to include the same within the limits of the bay), to the great lake Miscosinke, alias Mistoveny, dividing the said lake into parts (as in the map to be delivered to you); and that where the said line shall cut the 49th degree of northern latitude, another line shall begin, and be extended westward from the said lake, upon the 49th degree of northern latitude, over which said line so to be described as above mentioned, the French, and all persons by them employed, shall be prohibited to pass to the northward of the said 49th degree of latitude, and to the north or north-westward of the said lake or supposed line, by land or water, on or through any rivers, lakes or countries to trade or erect any forts or settlements"—

and so on. Then follow the instructions about the Latin treaty.

Mr. SCOBLE.—Will you read the next paragraph?

Mr. MCCARTHY:

"But you are to take especial care, in wording such articles as shall be agreed upon with the commissary of His Most Christian Majesty upon this head, that the said boundaries be understood to regard the trade of the Hudson's Bay Company only; that His Majesty does not thereby recede from the right to any lands in America not comprised within the said boundaries, and that no pretension be thereby given to the French to claim any tracts of land in America, southward or south-west of the said boundaries."

Lord ABERDARE.—Those are references to what we call the United States now.

Mr. MCCARTHY.—I thought it was perfectly understood that this was only determining the limits on the north. My friend's point is, that it speaks of the trade of the Hudson's Bay Company, but I do not think that was the intention of it.

The LORD CHANCELLOR.—I think it is probably intended to guard against ceding to the French everything to the south of this line.

Mr. McCarthy.—That is what I thought. The next is very important:

"And whereas it hath been represented by the said company that the French have, since the Peace of Utrecht, viz., in 1715, made a settlement at the head of the Albany River, upon which river the company's principal factory is settled, whereby the French may intercept the Indian trade from coming to the said factory, and may in time utterly ruin the trade of the company if not prevented, you are to insist that the said fort be given up, or demolished, by the French, and their subjects be withdrawn from that settlement."

The Lord Chancellor.—You might possibly treat the Albany River as commencing at the foot of Lake St. Joseph.

Mr. McCarthy.—That is the way it is spoken of now. That is what is called Albany River now—from Lake St. Joseph down. I do not know what it was in those days.

Sir Robert Collier.—That is called Albany River, from Lake St. Joseph.

The Lord Chancellor.—The Fort La Maune was built before 1684, and therefore cannot be the one which is here referred to.

Mr. McCarthy.—I think that it may be taken for granted, that the fort spoken of is that one midway up the river.

The Lord Chancellor.—You may think so; but it is not the natural conclusion to be drawn from this.

Mr. McCarthy.—I think perhaps we can satisfy your Lordships upon that. Then, if your Lordships will come to page 511, we have the boundaries claimed by the English Commissaries, 1719.*

The Lord Chancellor.—That is the 49th parallel?

Mr. McCarthy.—Yes; that is all I have been able to shew your Lordship. They never claimed anything but the 49th. There is not a word in this correspondence about that. I have only said, looking at the map, and looking at the knowledge the French had, and I suppose the knowledge the English had, at that time, if a straight line were taken that would be a fair line.

The Lord Chancellor.—You do not imagine that both the French and the English supposed that every river from the Pacific side flowed into Hudson's Bay. They may not have known the geography of the Rocky Mountains, or the country at the west side of them, but it would be a very extraordinary thing to suppose they imagined there was no river between the two seas which did not flow into Hudson's Bay.

Lord Aberdare.—I suppose they dealt practically with this 49th line as dealing with the countries they knew of.

Mr. McCarthy.—That is what I was going to say. If you look at page 511, there is something to support the English point of view about this contention regarding the rivers. That is, the latter part of the boundaries claimed by the English Commissaries:

"The said Commissaries further demand that the subjects of His Most Christian Majesty shall not build forts, or found settlements, upon any of the rivers which empty into Hudson's Bay, under any pretext whatsoever, and that the stream and the entire navigation of all the said rivers, shall be left free to the company of English merchants trading into Hudson's Bay, and to such Indians as shall wish to traffic with them."†

The instructions to Mr. Bladen are that he is authorized to agree to that line, and your Lordship will see that had already been provided by the Treaty of Utrecht. That treaty provided that was to be the boundary line between the two sides,

* Printed *ante*, p. 159, note *.

†In making this demand the English Commissaries exceeded their instructions. See *ante*, p. 159, sub-note [1].

which neither was to cross. Then we come to the declaration of war: 1740 or 1741 seems to have been the date of the declaration of war. All I can say is, that up to this stage that was the claim made by the English. That claim, so far as the evidence shews, was not acceded to, though it does not say, up to this date particularly, that it was not.* I have not been able to prove to your Lordships that it was. There is one statement which has been cited by my learned friend.

The LORD CHANCELLOR.—More than one—several statements.

Mr. MCCARTHY.—Your Lordship has not heard me out. There is one statement, shewing the difference between the two was two degrees, and the French were claiming it should be 51°, instead of 49°.

The LORD CHANCELLOR.—I do not recollect that.

Mr. MCCARTHY.—I can refer to that statement. It is mentioned in Chief Justice Draper's memorandum.

Mr. MOWAT.—The reference is to the maps differing two degrees.

Mr. MCCARTHY.—I thought it was that the French commissioners insisted at this time on two degrees further north. That is my recollection of it.

The LORD CHANCELLOR.—Let us see.

Mr. MCCARTHY.—It is page 213.

The LORD CHANCELLOR.—This is in 1857.

Mr. MCCARTHY.—Yes. It was the report sent by Chief Justice Draper. It is put most strongly against the company, of course.

The LORD CHANCELLOR.—Which is the passage?

Mr. MCCARTHY.—I had better not detain your Lordship, as I cannot put my hand upon it at this moment.†

Lord ABERDARE.—He says, at the bottom of page 215:

"That at various periods subsequently to 1670 and to 1750, the Hudson's Bay Company had been called upon to point out the extent of their territorial claims under the charter, and to define the boundary which they claimed, and that on no one occasion during all that period had they advanced the claim they now insisted upon, namely, that the charter gave them the ownership of the lands, the water from which flows into the Hudson's Bay or Straits, and therefore extending so far as the head waters of the Red River, and east and west of that stream to the sources of its tributaries, though the Ashburton treaty has of course disposed of so much of that claim as lies south of the 49th parallel of latitude."

The LORD CHANCELLOR.—I have no note of any such statement.

Mr. MCCARTHY.—We have not come to that yet. Your Lordship will find they did claim that and a little more.

Sir ROBERT COLLIER.—Subsequently they claimed a grant to Earl Selkirk.

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—Lord Selkirk did not go beyond the watershed.

Mr. MCCARTHY.—No; he was bounded by the watershed. I think I shall be able to find that. I must pass it by, for the present.‡ Then the war occurs,

* The evidence before the Board, and hereinbefore several times cited or referred to, conclusively shews that neither the line of 49° nor any other line proposed by the English had been acceded to by France up to the time of the cession of Canada.

† The passage is at p. 197 of the Joint Appendix, and occurs in the following extract from Chief Justice Draper's memorandum submitted to the Secretary of State for the Colonies on the 6th of May, 1857, viz.:—

"The French Government, it appears, would not agree to the proposal which would have limited them to the 49th parallel. Colonel Bladen, one of the British Commissioners under the Treaty of Utrecht, wrote from Paris, in 1719, in reference thereto: 'I already see some difficulty in the execution of this affair, there being at least the difference of two degrees between the last French maps and that which the Company delivered us.' No settlement of the boundary could be arrived at."

‡ See the boundary description of the assumed grant of the Hudson's Bay Company to Lord Selkirk, *post*, p. 239, note†.

and during the war, the next thing that we have with regard to the company is a claim by rival adventurers, setting forth pretty much the same that has been set forth by my learned friends on the other side, namely, that the Hudson's Bay Company had not fulfilled their mission, and they prayed that a new charter be granted to them, they undertaking to do what the Hudson's Bay Company, it was alleged, had undertaken by their charter to do, and in consideration of that, all the property not actually possessed by the Hudson's Bay Company should be granted. I refer your Lordship to that petition for the purpose of shewing what followed upon it.

Sir Montague Smith.—You are going back in date.

Lord Aberdare.—I thought we had got to 541.

Mr. McCarthy.—The documents are all scattered, unfortunately. It has been impossible to keep them in any kind of sequence.*

The Lord Chancellor.—Who did Chief Justice Draper represent?

Mr. McCarthy.—He represented the old Province of Canada, before Confederation. Old Canada was Upper and Lower Canada, now Quebec and Ontario, two of the provinces of the Dominion. What I propose to refer to is the claim made at this date, on page 580 and 581. The Hudson's Bay Company were complained of in the sense I have put. It commences at the foot of page 581: "Captain Middleton to A. Dobbs, Esq."† It is more clearly shewn in the document contained at page 598. The result of it appears to have been this, that it was referred to the Attorney-General and the Solicitor-General for their joint opinion. They not only took the complaint into consideration, but they heard counsel, and I think they had deposition evidence before them upon the question, and it seems to be a quasi-judicial determination of the very matters which, at this late day, are raised again by my learned friends. This is the report of the learned Attorney and Solicitor-General:‡

"*To the Right Honourable the Lords of Committee of His Majesty's Most Honourable Privy Council.*

"May it Please Your Lordships:

"In humble obedience to your Lordship's Order in Council of the 4th of February last, representing that by an Order in Council bearing date the 26th of January last, there was referred to your Lordships the humble petition of Arthur Dobbs, Esq., and the rest of the committee appointed by the subscribers for finding out a passage to the Western and Southern Ocean of America, for themselves and the other adventurers, and that your Lordships, having taken the said petition into consideration, were pleased to refer the same to us to consider thereof, and to report our opinion thereupon to your Lordships. Which petition set forth, That the petitioners, in the year 1746, did, at their own costs and charges, fit out two ships upon an expedition in search of the north-west passage to the Western and Southern Ocean of America, in order to extend the trade and increase the wealth and power of great Britain, by finding out new countries and nations to trade with us, as well in the great north-western continent of America, beyond Hudson's Bay, as in countries still further distant and hitherto unknown to the Europeans, and also to many large and populous islands in that great Western Ocean; That the petitioners, by means of the said expedition, have made several discoveries of bays, inlets and coasts,

* Pursuant to a well-considered plan, the documents were classified in the Appendices according to their kind, and assigned to their proper places in the various Sections, as for instance, Imperial Statutes and Acts of State, Treaties and Conventions, Judicial Proceedings, Hudson's Bay Company's Rights and Claims, etc.

† Quoted *ante*, p. 59.

‡ Joint opinion of the Attorney-General and Solicitor-General, Sir Dudley Ryder and Sir William Murray, August 10th, 1784.

before unknown, and have a reasonable prospect of finding a passage to the Southern Ocean by sea, although the discovery may not be perfected without repeated trials, upon account of the difficulties and dangers of searching different unknown inlets and straits, and sailing through new seas, and of procuring men of resolution, capacity and integrity to pursue it effectually; That the petitioners find that the reward of £20,000 given by Parliament, is not adequate to the expense the adventurers must be at to perfect the discovery, they having already expended above that sum in their late expedition; That the petitioners find that upon a former attempt, His Majesty's predecessor, King Charles the Second, as a suitable encouragement, granted a Royal Charter to the Governor and Company of Adventurers of England trading to Hudson's Bay, making them a body corporate for ever, upon their petition setting forth that they had, at their own proper costs and charges, made an expedition to discover a new passage into the South Sea, and for finding some trade of furs, mines and other commodities, and gave them the sole property of all the lands they should discover, together with an exclusive trade to all the countries within Hudson's Straits, not in possession of his subjects or of any other Christian power, with the royalties of mines, minerals, gems and royal fish, to enable them to find out the passage, extend the trade, and to plant the countries they should discover, paying two elks and two black beavers whenever and as often as His Majesty and his successors should enter their territories, granting to them the greatest privileges as lord proprietors, saving only their faith and allegiance to the Crown of Great Britain; The petitioners beg leave to observe that the said company have not since effectually, or in earnest, searched for the said passage, but have rather endeavoured to conceal the same, and to obstruct the discovery thereof by others, nor have they made any new discovery, either upon the coast, or in the inland countries adjoining to Hudson's Bay since the grant of their charter, nor have they taken possession of or occupied any of the lands granted to them, or extended their trade into the inland parts of the adjoining continent, nor made any plantations or settlements, except four factories and one small trading house, in all which they have maintained in time of peace about one hundred and twenty persons, servants of the company, nor have they allowed any other of His Majesty's subjects to plant, settle or trade in any of the countries adjoining to the Bay granted to them by their charter, yet have connived at or allowed the French to encroach, settle and trade within their limits on the south side of the bay, to the great detriment and loss of Great Britain."

The LORD CHANCELLOR.—They want to be incorporated.

Mr. MCCARTHY.—They want to be incorporated. Their prayer is set out at page 599, and it is this:

"That His Majesty would be graciously pleased to incorporate the petitioners and the other subscribers for finding out the said passage, or such of them and such other persons as they shall engage in the said undertaking, and their successors forever, and grant to them the property of all the lands which they shall discover."

The attorney-general and solicitor-general were attended by counsel on both sides, and I venture to say their decision amounts to a quasi-judicial decision.

SIR ROBERT COLLIER.—It amounts to a decision that the Hudson's Bay Company had not forfeited their charter, that is all.

The LORD CHANCELLOR.—The solicitor-general hears and decides on applications in patent cases, but one never understood that his decisions were judicial decisions.

Mr. MCCARTHY.—I say a quasi-judicial decision.

The LORD CHANCELLOR.—It can hardly be regarded as having any greater authority than that which appears on the face of it. He had no original jurisdiction to determine this matter. It is a reference by the Crown. They advise the Crown, and to assist them in that advice they hear what both parties have to say, and the parties employ counsel.

Mr. McCarthy.—I submit it is different from the opinion of counsel obtained by the company.

The Lord Chancellor.—Yes, it is the opinion of two law officers of the Crown, men of great reputation, and I dare say quite as valuable as a very large proportion of the documents in this book.

Sir Robert Collier.—It seems to me to have very little bearing upon the question. If you read the last paragraph you will see exactly what they did.

Mr. McCarthy.—We must see what the claim was:

"The petitioners insisted on two general things, that the company's charter was either void of its original creation, or became forfeited by the company's conduct under it."

The first part is not in question.

Sir Montague Smith.—What do you say it shews?

Mr. McCarthy.—I say it shews, as to the question of the occupation by the company, propounded by my learned friend Mr. Mowat to your Lordships, the non-occupation by the company of all the territory did not work a forfeiture of any part of the land granted.

Sir Robert Collier.—Nobody contends it did.

Mr. McCarthy.—Oh, yes.

Sir Robert Collier.—You may as well read it:

"But as the grant proposed is not necessary in order to prosecute any future attempt of the like kind, and the charter of the Hudson's Bay Company does not prohibit the petitioners from the use of any of the ports, rivers, or seas included in their charter,"

they are inclined to think the charter of the Hudson's Bay Company did not give them an exclusive right of trade.

Lord Aberdare.—The whole question is about a grant of £20,000 to find the north-west passage to the Pacific. I think what was meant was, that the granting of the charter did not prohibit these men from passing to their discoveries that way.

Mr. McCarthy.—I suppose that is one thing they mean. Here is a distinct indictment against the company. It was followed then by an argument on behalf of the petitioners, which the company opposed by their counsel, and finally the law officers say, with respect to both these, what? What is the first? The first is, that the company's charter was void.

Sir Montague Smith.—They give no opinion. They say it is not expedient to advise the Crown to declare the charter void:

"With respect to both these, considering how long the company have enjoyed and acted under this charter, without interruption or encroachment, we cannot think it advisable for His Majesty to make any express or implied declaration against the validity of it, till there has been some judgment of a court of justice to warrant it; and the rather because if the charter is void in either respect, there is nothing to hinder the petitioners from exercising the same trade,"

and so on.

Sir Robert Collier.—Yes, that is, they had not the exclusive right of using those rivers. This really has no bearing upon the question.

Sir Montague Smith.—No; I do not think it is of any use at all.

Mr. McCarthy.—This, I think, is very important. I will state what it is; your Lordships will see whether it is important or not. From a certain period during the war, the Hudson's Bay Company were giving directions to their servants how to defend themselves. Then in 1748, is the Treaty of Aix la

Chapelle.* The effect of it was to restore, so far as this question is concerned, the Treaty of Utrecht. It is spoken of in the documents.

Sir ROBERT COLLIER.—It really restored the Treaty of Utrecht?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—It merely restored what had been taken in war, so far as I can see.

Mr. MCCARTHY.—The effect of it was to restore the treaty. It left things as they were before.

The LORD CHANCELLOR.—There is nothing whatever about restoring:

"All the conquests that have been made since the commencement of the present war, or which, since the conclusion of the preliminary articles, signed the 30th of April last, may have been or shall be made, either in Europe or the East and West Indies, or in any part of the world whatsoever, being to be restored,"

that is all.

Mr. MCCARTHY.—I take it, the effect of that is, there being no war between the Treaty of Utrecht and that, if everything taken during the war was to be restored, it leaves matters as they were at the Treaty of Utrecht.

The LORD CHANCELLOR.—If something of which the British had been in possession under the Treaty of Utrecht had been taken by conquest from them by the French during the war, that is to be restored. If nothing had been taken by conquest, it does not seem to affect the question one way or the other.

Mr. MCCARTHY.—That is what I mean. It does not seem to affect the question one way or the other, except, that the parties upon that immediately proceeded to appoint commissaries to fix these limits. The Hudson's Bay Company were called upon then to put in their claim. That you will find in the Manitoba Appendix, page 24.† This is the memorial, just continuing the narrative, and that sets out:

"The said governor and company in obedience to your Lordships' orders of the 25th July last, requiring them to lay before your Lordships an account of the limits and boundaries of the territory granted to them, represent to your Lordships"—

This contains the first claim made by the Hudson's Bay Company, as between themselves and the Crown, defining limits. Before that, they were proposing to the Crown, that, between France and England, the 49th parallel should be the limit under the Treaty of Utrecht. Now they set out what they claim the charter means:

"The said straits and bay, commonly called Hudson's Straits and Bay, are now so well known that it is apprehended they stand in no need of any particular description, further than by the chart or map herewith delivered to your Lordships; and the limits or boundaries of the lands or countries lying round the same, comprised, as

* The TREATY OF AIX LA CHAPELLE, 1748.

[By Article III., some former treaties, including the treaty of peace of Utrecht, were "renewed and confirmed."]

Art. V. All the conquests that have been made since the commencement of the present war, or which, since the conclusion of the preliminary articles, signed the 30th April last, may have been or shall be made, either in Europe or the East and West Indies, or in any part of the world whatsoever, being to be restored without exception, in conformity to what was stipulated by the said preliminary articles, and by the declaration since signed, the high contracting parties agree to give orders immediately for proceeding to the restitution, as well as to the putting the Most Serene Infant, Don Philip, in possession of the states which are to be yielded to him by virtue of the said preliminaries, the said parties solemnly renouncing, as well for themselves as their heirs and successors, all rights and claims, by what title or pretence soever, to all the states, countries, and places that they respectively engage to restore or yield; saving, however, the reversion stipulated of the states yielded to the Most Serene Infant, Don Philip.

† Extracts from the Hudson's Bay Company's Memorial of 3rd October, 1750. A full copy of this memorial was put in by Ontario, separately from the Appendices, and is to be found in the complete edition of the collection, "Ontario Boundaries before Privy Council, 1884."

your memorialists conceive, in the said grant, are as follows, that is to say: all the land lying on the east side or coast of the said bay, and extending from the bay eastward to the Atlantic Ocean and Davis' Straits, and the line hereinafter mentioned as the east and south-eastward boundaries of the said company's territories; and towards the north, all the lands that lie at the north end, or on the north side or coast of the said bay, and extending from the bay northward to the utmost limits of the land there, towards the north pole, but where or how those lands terminate is hitherto unknown; and towards the west, all the lands that lie on the west side or coast of the said bay, and extending from the bay westward to the utmost limits of those lands, but where or how those lands terminate to the westward is also unknown, though, probably, it will be found they terminate on the great South Sea."

The LORD CHANCELLOR.—Then it is quite clear the watershed is not regarded there.

Mr. MCCARTHY.—No, they do not speak of the watershed at that date.

The LORD CHANCELLOR.—No; they not only do not speak of it, but they make a claim which is absolutely inconsistent with it,* because they claim the waters which flow into the two oceans, and the waters which flow into the Arctic Ocean. They must have known by experience that there were waters which went into the sea, and not into Hudson's Bay.

Mr. MCCARTHY.—They must have gone far away to the west of that.

The LORD CHANCELLOR.—They have gone to the north, the east, and the west of that watershed.

Mr. MCCARTHY.—There was no law of nature which absolutely precluded the waters from flowing into Hudson's Bay.

The LORD CHANCELLOR.—We cannot exclude all that which was known to geographers by experience.

Mr. MCCARTHY.—However, I will read this. In the first place, it includes more than the Hudson's Bay included. Your Lordship remembers the language of the Rupert's Land Act, it is all they ever "claimed."

The LORD CHANCELLOR.—It is the whole of North America, north of the French possessions. That is the long and short of it.

Sir MONTAGUE SMITH.—And to "the great South Sea."

Mr. MCCARTHY.—No doubt it is wide enough and large enough to cover all.

The LORD CHANCELLOR.—I see the southern boundary referred to is, exactly, the 49th degree.

Mr. MCCARTHY.—Yes. Then, I will go to the correspondence which follows on that, between the governments,† which your Lordships will find

* The description of the southerly boundary, omitted *supra*, is also inconsistent with it, viz.: "And towards the south, all the lands that lie at the south end or south side or coast of the said bay, the extent of which lands towards the south to be limited and divided from the places appertaining to the French in those parts, by a line to be drawn for that purpose, to begin from the Atlantic Ocean on the east side, at an island called Grimington's Island, otherwise Cape Perdrix, in the latitude of 58½°, on the Labrador coast, and to be drawn from thence south-westward to the great lake Miscosinke, otherwise called Mistoseny, and through the same, dividing that lake into two parts, down to the 49th degree of north latitude, as described in the said map or plan delivered herewith, and from thence to be continued by a meridian line of the said latitude of 49° westwards."

† On the 14th of May, 1755, a *memoire* was delivered by the French Ambassador in London (the Duke de Mirepoix) to the British Minister for Foreign Affairs, which, with regard to the limits of Canada, ran as follows:—

"The Court of France have decisively rejected, and will always reject, the proposition which has been made by England, that the southern bank of the River St. Lawrence, and Lakes Ontario and Erie, shall serve as boundaries between the two nations.

"It is necessary to establish, as a base of negotiation relative to this Article, that the River St. Lawrence is the centre of Canada. This truth is justified by all titles, by all authors, and by possession. All that France will be able to admit, after having established this principle, which cannot be reasonably con-

at page 27. Some of this correspondence which is stated here at page 27 becomes important. I will read the first statement at line 20. This is the French view. They lay down certain points, which it is necessary to refer to :

"It is necessary to establish, as a basis of negotiation relative to this article"—viz., article 2, regarding the limits of Canada—"that the River St. Lawrence is the centre of Canada This truth is justified by all titles, by all authors, and by possession. All that France will be able to admit, after having established this principle, which cannot be reasonably contradicted, is to examine, in regard to this object, whether the reciprocal

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tradicted, is to examine, in regard to this object, whether the reciprocal convenience of the two nations can exact some particular arrangement thereto, in order to fix invariably the respective boundaries.

"The only pretext the English make use of to colour their pretensions is drawn from Article 15 of the Treaty of Utrecht ; but, in examining attentively all the expressions of that Article, it is evident that nothing is less founded than the inductions which the Court of London actually wish to draw from it.

"1. It is only a question in this Article of the person of the savages, and not at all of their country, or pretended territory, since they have no determined territory, and the only knowledge they have of property is the actual use they make of the land they occupy to-day, and which they will cease perhaps to occupy to-morrow. * * * *

"4. Article 15 of the Treaty of Utrecht contains the same stipulations as much in favour of the French as in favour of the English, and these stipulations are mutual ; the French could then sustain, with a better title than the English pretend about the Iroquois, that the nations Abénaquises and Souriquoises, otherwise Micmacs, Malécites, Cannibas, etc., are subjects of France, and as there are some Souriquois who inhabit the extremity of the Peninsula of Cote, Cape Fourcher, and Cape Sable, it would follow that the French could pretend to form settlements there with as much right as the English have formed them at Oswego, or Chouagen, on the shores of Lake Ontario, in 1726 or 1727, and consequently long after the Peace of Utrecht ; France has not ceased since that time to complain of that enterprise, and she relies upon the Fort of Chouagen being destroyed.

"5. The Treaty of Utrecht has been ill interpreted in pretending that it would authorize the French and English to go and trade indiscriminately amongst all the savage nations, under pretext of subjection, alliance or friendship. This article, well understood, and well expounded, assures only the liberty of commerce which the savages can make among themselves, or with the European nations, and does not at all authorize them to leave the confines of their colonies to go and trade with the savages."

On the 7th of June following, the British Government returned a reply to this *memoire*, repeating article by article ; and with reference to the limits of Canada, said :—

"It will be difficult to form a precise idea of what is called in the memorial the centre of Canada, and still less can it be admitted as a base of negotiation that the River St. Lawrence is the centre of that Province ; this is advanced without proof, and it is impossible that the course of a river of that length can form the centre of any country. Besides, Great Britain cannot grant that the country between the northern coast of the Bay of Fundy and the southern bank of the River St. Lawrence, which Great Britain has already offered to leave neutral, and not possessed by either of the two nations, in reserve for the borders that are proposed to be drawn for it, ought to be regarded or has ever been considered as a part of Canada, since the contrary has been demonstrated by authentic proofs. Neither can Great Britain admit that France has right to Lakes Ontario and Erie, and the Niagara River, and to the navigation of these waters exclusively, since it is evident by incontestable facts, that the subjects of Great Britain and of France, as well as the Five Nations Iroquois, have indiscriminately made use of the navigation of these lakes and this river, according as occasions and convenience have required ; but as regards a piece situated on the south bank of the River St. Lawrence, exclusive of that already proposed to be left neutral, the boundaries of which are in dispute between the two nations or their respective colonies, the Court of Great Britain is ready to enter into a discussion in regard to this, and to fix the limits of it by an amicable negotiation, but without prejudice, nevertheless, to the rights and possessions of any of these Five Nations.

"With regard to the exposition that is made in the French memorial, of the 15th Article of the Treaty of Utrecht, the Court of Great Britain does not conceive that it is authorized either by the words or the intention of that Article.

"1. The Court of Great Britain cannot admit that this Article only has regard to the person of the savages, and not their country ; the words of that Treaty are clear and precise, viz. : The Five Nations or Cantons Indians are subject to the rule of Great Britain, which, by the accepted exposition of all treaties must have reference to the country as well as to the person of the inhabitants. * * *

"4. It is true that the 15th Article of the Treaty of Utrecht contains the same stipulations in favour of the French as in favour of the English, with regard to such Indian nations as shall be deemed, after the conclusion of this Treaty, by Commissaries, to be subjects of Great Britain or of France ; but as to what is mentioned of the Five Nations or Cantons Iroquois, France has distinctly and specifically declared by the said 15th Article that they are subjects of Great Britain, '*Magnæ Britanniæ imperio subjecta*,' and consequently this is a point to be no more disputed about.

"5. In whatever manner one interprets the Treaty of Utrecht, with respect to the trade which will be permitted the English and French to carry on indiscriminately with the savage nations, it is nevertheless very certain that such a general trade is by no means forbidden by this treaty. It is an ordinary and natural right to transact business with one's own subjects, allies or friends ; but to come in force into the territories belonging to the subjects or allies of another Crown, to build forts there, to deprive them of their territories and to appropriate them, is not and will not be authorized by any pretension, not even by the most uncertain of all, viz., convenience. However, such are the Forts of Frederick, Niagara, Presqu'isle, Rivière-aux-Bœufs, and all those that have been built on the Oyo and in the adjacent countries. Whatever pretext France can allege for regarding these countries as dependencies of Canada, it is certainly

convenience of the two nations can exact some particular arrangement thereto in order to fix invariably the respective boundaries."

Then the answer of the English to that is found at page 29, at the foot of the page:

"In whatever manner one interprets the Treaty of Utrecht, with respect to the trade which will be permitted the French and English to carry on indiscriminately with the savage nations, it is nevertheless very certain that such a general trade is by no means forbidden by this treaty. It is an ordinary and natural right to transact business with one's own subjects, allies or friends; but to come in force into the territories"—I draw your Lordships' particular attention to this—"belonging to the subjects or allies of another Crown, to build forts there, to deprive them of their territories, and to appropriate them, is not and will not be authorized by any pretension, not even by the most uncertain of all, viz., convenience."

Then it goes on to say:

"However, such are the forts of Frederick, Niagara, Presqu'isle, Rivière aux Bœufs, and all those that have been built on the Oyo and in the adjacent countries. Whatever pretext France can allege for regarding these countries as dependencies of Canada, it is certainly true that they have belonged to, and (inasmuch as they have not been ceded or transferred to the English) belong still, to the same Indian nations that France has agreed by the 15th Article of the Treaty of Utrecht not to molest?"

The LORD CHANCELLOR.—South of the great lakes?

Mr. MCCARTHY.—Yes. All I state it for, is for the purpose of shewing that that is the contention. The importance I attach to it is this. Your Lordship will remember that my friends have contended that the occupation of the French of this western country, which took place between 1719, or thereabouts, and the final cession in 1763, deprived the Crown of it, and of course also the Hudson's Bay Company. That has been the argument used. Now what I say is, that the English, from the Treaty of Utrecht, were endeavouring to get this line fixed. The line either was or was not fixed. If it was fixed, we contend it was placed at the 49th parallel.* If it was not fixed, then, at all events, the French were trespassing or poaching on the ground of the Hudson's Bay Company, without colour of right;† and the English, in 1750, before the outbreak of the war, speak of it in that way:‡

"It is an ordinary and natural right to transact business with one's own subjects, allies or friends, but to come in force into the territories belonging to the subjects or allies of another Crown, to build forts there"—that is supposing they did build up forts in this country—"to deprive them of their territories, and to appropriate them, is not,

true that they have belonged to, and (inasmuch as they have not been ceded or transferred to the English) belong still to the same Indian nations that France has agreed by the 15th Article of the Treaty of Utrecht, not to molest, '*Nullo in posterum impedimenta aut molestia efficiant.*'"

Article XV. of the Treaty of Utrecht, 1713, above referred to, is as follows:—

XV. The subjects of France inhabiting Canada, and others, shall hereafter give no hinderance or molestation to the Five Nations or Cantons of Indians subject to the dominion of Great Britain, nor to the other natives of America who are friends to the same. In like manner the subjects of Great Britain shall behave themselves peaceably towards the Americans who are subjects or friends to France; and on both sides they shall enjoy full liberty of going and coming on account of trade. As also the natives of those countries shall with the same liberty, resort, as they please, to the British and French colonies, for promoting trade on one side and the other, without any molestation or hinderance, either on the part of the British subjects or of the French. But it is to be exactly and distinctly settled by commissioners, who are, and who ought to be, accounted the subjects and friends of Britain or of France.

* The evidence shews that it was not fixed. See *ante*, pp. 142, note ‡, 219, note †, 222, note †.

† To thus assume that the North-West was "ground of the Hudson's Bay Company," is simply a begging of the question.

‡ This utterance of the English had no reference whatsoever to the North-West, but only to the region claimed by the Iroquois or their allies south of Lakes Erie and Ontario.

and will not be, authorized by any pretension, not even by the most uncertain of all, viz, convenience."

No doubt that is referring to other forts, specifically.

The LORD CHANCELLOR.—Yes, but that tends to shew that the complaint was in respect of some of the forts and some of the districts which were part of Canada.

Mr. MCCARTHY.—No; the forts they are now speaking of are forts south of the lake.

The LORD CHANCELLOR.—They are now in the territory of the United States?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—Are they treated as in Canada in the Treaty of Utrecht?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—Then I think I am right in what I said, that this passage includes some districts which were part of Canada.

Mr. MCCARTHY.—No; that was not so in reality. Your Lordship remembers that south of the lakes there is no boundary at all between the two countries. In the Treaty of Paris, they do not speak of any boundary at all. They take the Mississippi as the dividing line, and there is no attempt on the part of the French to say that anything south of the lakes belonged to the French.*

The LORD CHANCELLOR.—Certainly, there were certain settlements before that treaty, which were not affected in any way by that; and between the settlements and the lakes there were certain French territories.

Mr. MCCARTHY.—Your Lordship will see on the map that there were French posts; but the English say, you having erected posts there, we do not think it is right and proper:

"It is an ordinary and natural right to transact business with one's own subjects, allies or friends, but to come in force into the territories belonging to the subjects or allies of another Crown, to build forts there, to deprive them of their territories and to appropriate them, is not and will not be authorized by any pretension, not even by the most uncertain of all, viz, convenience."

I say that not only applies to those forts south of these lakes, but it applies to the posts and forts to the west, which are on the map more immediately before your Lordships on this discussion.†

Now, I go back to the Joint Appendix, page 586. It is headed "Memorandum of 1752," and it is a mere repetition of what has already occurred, claiming the same limitary line,‡ and still the same amount of damages. Then, in 1759—

* The French, during their *regime*, always claimed the southerly watershed of the lakes, as also the territories drained by the Ohio and other tributaries of the Mississippi. The tract from the mouth of the Niagara River, to and including the upper branches of the Ohio, was covered by their forts, as Forts Niagara, Victor, Presqu'isle, Le Bœuf, Venango, Machault and Du Quesne. All the French possessions east of the Mississippi having been ceded to Great Britain by the Treaty of Paris, there was no occasion for making reference in the treaty to any southern boundary in that quarter.

† The documents shew that this is a misapprehension. The statement in the reply of the British Government to the French *memoire* had sole reference to the country southward of the lakes and the forts built therein, the contention being in regard to Article XV. of the Treaty of Utrecht respecting the Indian nations, Great Britain claiming that this tract of country belonged to the Iroquois, who had by that article been acknowledged to be subject to her dominion. (See *ante*, p. 230, note †).

‡ "The Hudson's Bay Company claim the lands to the northward of a line drawn from 56½ degrees of north latitude in the Atlantic Ocean, south westward to the Lake Miscosink, otherwise Mistoseuey, and, through the same lake, down to the 49th degree of north latitude (as described in a map delivered to the Lords of Trade), and thence continued by a meridian line of the said latitude of 49 degrees, westward." * * * *

The LORD CHANCELLOR.—Before you entirely depart from that—the limits of the Province of Quebec are here accurately defined in the commission at the end of page 375 ? *

Mr. MCCARTHY.—It is long after that.

The LORD CHANCELLOR.—I do not say it is contemporaneous exactly with the cession. I want to know whether it is the fact that within those limits are these places which are south of the lakes ?

Mr. MCCARTHY.—Yes, undoubtedly. I have said so. These posts are there.

The LORD CHANCELLOR.—Within the Province of Quebec, as constituted under the commission of 1774 ?

Mr. MCCARTHY.—Yes, undoubtedly.† Then in 1759 the Hudson's Bay Company again memorialize. This is at page 587. This is "To the Right Honourable the Lords Commissioners of Trade and Plantations," and it sets out a good deal that we have had over and over again ; and then it says :

"That in pursuance of the said treaty, and an especial commission of her said late Majesty, Queen Anne, dated the 20th of July, 1713, the said bay and lands, then in possession of the French, were delivered up to Governor Knight and Kelsey, who took possession thereof for the English Hudson's Bay Company, and commissaries were appointed to settle the said limits, and adjust the damages the Company had sustained, which, for the ships and goods of the company taken by the French, appears by an account stated in the year 1713, and delivered to the then Lords Commissioners of Trade and Plantations, amounted to upwards of £100,000, besides the damages the company sustained by the enemies' burning three of their forts and factories, at Charlton Island, Moose River, and New Severn. And proceedings were had by the said commissaries towards settling the same, but they were never able to bring the settlement of the said limits to a final conclusion, nor did the said Hudson's Bay Company ever receive any satisfaction for their said damages. That the papers which were laid before the said commissaries, and the minutes of their proceedings, as also a memorial relative to this matter, which in the year 1750, after the conclusion of the last war, was presented to your Lordships, remaining, as your memorialists believe, in your Lordships' office, it is conceived from thence will appear the best state of the rights of both Crowns, and of the territories and claims of the said company that can be laid before your Lordships, whereto your memorialists beg leave to refer."

Then the prayer is :

"In case any treaty of peace shall be set on foot between this nation and France, that your Lordships will intercede with His Majesty to take the premises into His Royal consideration, and that he will be graciously pleased to cause your memorialists to have full satisfaction made them, pursuant to the Treaty of Utrecht, for the aforesaid depredations they are thereby acknowledged to have sustained from the French in time of peace, and for which satisfaction is by the said treaty agreed to be made to the company, and that the limits of the said company's territory may be settled, as by the said treaty is also agreed."

There is no doubt at all that that is very strong evidence indeed, if not conclusive one would say (although I do not concede it), that the limits had not been defined. But my purpose for reading it is this, that up to that time, as late as this date, 1759, we find the English Hudson's Bay Company still claiming this 49th parallel, and that the English Government acknowledged the 49th parallel, and took the view of it that they were contending for. Now, let us see practically

* Commission to Governor-General Sir Guy Carleton, of 27 December, 1774, printed *ante*, p. 40.

† This is a misapprehension. All the forts named (see *ante*, p. 233, note *), were *excluded* from the Province of Quebec as so constituted, being south of the southerly boundary thereof. They were within the limits of New York and Pennsylvania – some in the one, and some in the other of those provinces.

what follows after that. Nothing comes after that I think until we get the treaty. Then, the whole country, the northern part of it, became British territory. Now, what is the effect? If the 49th parallel is established, the position of the Hudson's Bay Company is perfectly clear. If the 49th parallel is not taken as clearly fixed between the rival states, my position is that the English government, having adopted that as the line, and having taken that as the country, they were then bound by the 49th parallel, they never having repudiated it. As long as that was claimed as French territory, they say, That is the Hudson's Bay Company's land. Then they become the joint owners and possessors of all, and it has never been disclaimed, in any document that I have seen, that that was the limit fixed and conceded as between them and the Hudson's Bay Company.* My contention is, that they said the 49th parallel was the line which they were willing to accept for the purpose of the Utrecht treaty. They were willing to accept that, because they believed generally it was the height of land.

The LORD CHANCELLOR.—That is your theory.

Mr. MCCARTHY.—I meant that I was putting it forward as my theory.

The LORD CHANCELLOR.—They do not say so.

Mr. MCCARTHY.—They do not say so, but that is my theory, and that is the view on which the 49th parallel was taken.

The LORD CHANCELLOR.—It is quite clear to me that there are other large claims, north, east and west, which are inconsistent with any such theory.

Mr. MCCARTHY.—With great respect to your Lordship, not within that part of the country where it was known where the height of land was. Now the position of the Hudson's Bay Company would naturally be this: "We know where the height of land is in the eastern part of the continent: we say that it is about the 49th line."

The LORD CHANCELLOR.—It is a most singular thing, if that was all along in their minds, that they should never once have said so.

Mr. MCCARTHY.—It is no use my repeating what I have said of course, but they took the 49th instead of the 50th line: that is what I say.

The LORD PRESIDENT.—With respect to what the Hudson's Bay Company were entitled to claim, just look at page 512—"French Memoirs, 1719-20, relating to the limits of Hudson's Bay under the Treaty of Utrecht:"†

"2nd. They cannot say that any land, or river, or lake, belongs to Hudson's Bay; because if all the rivers which enter into this bay, or which communicate with it, belong to it, it might be said that all New France belonged to them." . . .

I suppose that was the French answer?

Mr. MCCARTHY.—Yes, that was the French answer.

The LORD PRESIDENT.—It shews what the French understand the company to mean.

The LORD CHANCELLOR.—I confess I do not quite agree with that. It seems to me that the French are putting that which is a *reductio ad absurdum*, not as the

* As against France, that was the line which the British claimed: but the French were prepared to reject it and to urge a much more northerly frontier. As under the treaty the final decision was to rest with commissaries, who never proceeded in the matter, it cannot now be predicated what their determination might have been, nor even whether the British, after presentation of the opposite case, might not have receded from their original demand.

Further, as between the British Crown and the company, Ontario claimed that the company had, as a result of the wars and treaties between the two powers, become divested of the territorial title which the charter purported to confer, except in so far as the Crown might thereafter see fit to recognize it, in whole or in part, *cum gratia*, and that the Crown having also become possessed of the rival title of France, it united in itself every interest. See *ante*, p. 190, note †.

† Printed *ante*, p. 112.

actual claim. They say that they cannot say that, and then they give a reason which I do not follow, I confess.

The LORD PRESIDENT.—It seems to me that the French understood the company to claim all the rivers which entered into the bay.

The LORD CHANCELLOR.—I do not think so. The French say they cannot claim that as a matter of fact. In no single document that I have seen have they ever put forward that claim—a great deal more than they expected to get.

Mr. MCCARTHY.—It is hardly so, in this particular country, which they knew all about. What could be more natural than, not knowing where the height of land is, for them to say: "We are a company; we have a charter," and knowing that in 1750 there were people opposing their charter, that they should put forward their claim in the way in which I submit they did. At all events, my argument is, that the Crown of England were, in good faith, as against this company, precluded from contending, as against the company, that the line did not go so far south as 49°.

The LORD CHANCELLOR —That there had been an endeavour in France to fix that line, which failed is true; but it did not bind the parties.

Mr. MCCARTHY.—It is not contended that the English had any other land there than that belonging to the company, which went down to the 49th parallel.

The LORD CHANCELLOR.—Do you put that by interpretation of the charter, or by actual possession, that it would be a give and take line? That would be your view?

Sir ROBERT COLLIER —If the English commissaries had been appointed, they might have taken some line intermediate between 49 and 51.

The LORD CHANCELLOR.—Your argument is not prejudiced by your having been willing to accept that line.

Mr. MCCARTHY.—At all events I am entitled to take this position. I suppose that nothing had happened to destroy the effect of the Hudson's Bay Company's grant. We have to go back to the Hudson's Bay Company's grant to see what that was. If the Hudson's Bay Company's grant means anything, it must mean all the country drained into Hudson's Bay—that at all events of which they took possession. Where else is the line to be drawn? It is either void, by reason of uncertainty, as not giving any limitary line, or it must go to the countries drained into Hudson's Bay. I submit that is the effect of the grant. From the treaty upwards, let us see what has been done. It has been urged before your Lordships, that there was no possession actually taken by the Hudson's Bay Company in the interior of the country until after the cession. Well, there were posts on the mouths of the rivers some leagues up; it is not very important how far up. These posts are set out on page 588 of the Joint Appendix,* but perhaps they are not so clearly set out there as at a subsequent place; but I will deal with those separately if your Lordships will permit me, as it is a matter that can be dealt with better separately, than if taken at this point of my argument. But, what I want to point out now is this. We now come to 1774. It is not denied, but rather admitted, that the Hudson's Bay Company did establish Cumberland post, or Cumberland House, the very year after the Act was passed.

The LORD CHANCELLOR.—Where is that?

Mr. MCCARTHY.—That is on the Saskatchewan. It is between 50 and 55 degrees, on the Saskatchewan.† It is spoken of in Mr. Henry's Travels, which is cited from the Ontario Appendix. He visited the country. He was a trader

*The posts there set out are all on the margin of the bay—not one in the interior. And in fact during the whole period of the French occupation, the Hudson's Bay Company had but one post away from the shore, and that not before 1740, viz., Henley.

† It was not on the Saskatchewan, but considerably north of that river, on Sturgeon Lake, and in lat. 53° 56', and long. 102° 15'.

from Montreal, and he speaks of this particular fort being there in 1774. It is at page 51.*

The LORD CHANCELLOR.—Are you referring to that to shew that wherever the French had forts the Hudson's Bay Company had forts also.

Mr. MCCARTHY.—Yes, I am leading up to shew what the Hudson's Bay Company had, in that way † It is at the foot of page 51:

"On the 26th October, [1775], we reached Cumberland House, one of the factories of Hudson's Bay Company, seated on Sturgeon Lake, in about 54° north latitude, and 102° longitude, west from Greenwich. This house had been built the year before, by Mr. Hearne, who was now absent on his well known journey of discovery. We found it garrisoned by Highlanders from the Orkney Islands, and under the command of a Mr. Cockings, by whom, though unwelcome guests, we were treated with much civility."

This Mr. Henry was one of those who were trading through the territory much against the will of the Hudson's Bay Company at this time:

"The design in building this house was to prevent the Indians dealing with the Canadian Merchants, and to induce them to go to Hudson's Bay."

The LORD CHANCELLOR.—I do not quite see the bearing of this on the dispute which is before us.

Mr. MCCARTHY.—It is not on the land now in dispute before your Lordships, but my friend's argument was, that between 1719 and the time of the cession, the French occupied that country, and he goes to this very point as one of them, commencing at Fort William, going to the Rainy Lake, the Lake of the Woods, and so on. French posts were established, and your Lordships will recollect my friend's contention was, that the effect of that was to cut down the Hudson's Bay charter, and to limit them—to drive them back—to confine their limits closer to Hudson's Bay. I am answering that by saying, that is not so, because, from this very date, the English were endeavouring to get the line fixed, the French were trespassing, and the Hudson's Bay Company were, as far as it was necessary for the purpose of their occupation—because after all it was a trading occupation—so far as it was necessary, the Hudson's Bay Company were occupying too,‡ and I propose to go on and shew what next they did.

The LORD CHANCELLOR.—It is impossible that the Cumberland House should be within the limits of the commission.

Mr. MCCARTHY.—No, it was not.

The LORD CHANCELLOR.—Then, that being so, it is outside this altogether.

Mr. MCCARTHY.—If your Lordship so rules it.

The LORD CHANCELLOR.—It is not a question of ruling; it must be so.

Mr. MCCARTHY.—I am contented to take it that it must be so.

Sir BARNES PEACOCK.—It is not in that territory.

*The Account is from Alexander Henry's, "Travels and Adventures in Canada and the Indian Territories, between the years 1761 and 1776." Fort Cumberland here mentioned, established in 1774, was the only post of the Hudson's Bay Company in the region of the North-West—the Winnipeg basin—before the period 1790-1799. Henry, at pp. 51-2 of the Ontario Appendix, also gives an account of the old French forts of St. Charles, on the Lake of the Woods; Dauphin to the north of Lake Manitoba; and Bourbon and Des Prairies, on the Saskatchewan: two of which, Dauphin and Des Prairies, were then occupied by the Canadian traders. The last mentioned fort, he states, "had usually fifty to eighty men for its defence." After 1763, and, of course, after the Act of 1774, the Hudson's Bay Company had the same rights of entry into and of trading in these countries of the North-West, formerly possessed by the French, that other British subjects had, neither more nor less, and it was in pursuance of this right that they reached Cumberland House. The company had never occupied, nor attempted to occupy, or to enter, any portion of the North-West during the period of the French dominion.

†The Hudson's Bay Company had no forts and no possession there during the French *regime*. See note *, *supra*.

‡All this is contrary to the evidence. See note *, *supra*.

Mr. McCarthy.—The argument is, that in 1719 the French sent an officer there, to the Western Sea. In 1730, that was followed up by other officers of the French commission appointed by the King to find the Western Sea, and they were told by the King: We are not going to pay you anything; you will pay yourselves by the trade you will get in passing through the country. Then this gentleman, Verendrye, established posts from point to point, and my friend argued that that had the effect of taking away the territory from the Hudson's Bay Company.

Mr. Mowat.—My argument was, that they never had it.

Mr. McCarthy.—If they had not got it then, they got it afterwards. Now I meet that argument by saying that the Hudson's Bay Company were in possession of the mouths of the rivers, and as it became necessary for the preservation of their trade, and as their strength permitted, they passed on, from time to time,* until eventually, in 1790, we find them down in Red Lake.

The Lord President.—They claimed the Saskatchewan, I presume because it was a river which drained into Hudson's Bay.

Mr. McCarthy.—Yes, and they got to Red River, which by some accident was ceded to the United States, down to the very Red Lake which is spoken of by Colonel Haldimand and his correspondents.

Lord Aberdare.—Near the source of the Mississippi?

Mr. McCarthy.—Near the source of the Mississippi.† I do not know that I need weary your Lordships by going through all these forts and the details of them. That is the result of it, that in 1790 we find them down in Red Lake.†

The Lord Chancellor.—That was long after the cession.

Mr. McCarthy.—Yes.

Lord Aberdare.—I think it might be taken that the Mississippi went a little northward.

Mr. McCarthy.—They took it, at that time, that the Pigeon River and all those rivers that went up, drained into the St. Lawrence, according to these maps; but as a matter of fact they all do not. Instead of taking the 49th parallel, they followed that which was a convenient boundary, until they got to the Lake of the Woods. I am coming to what the subsequent treaty and correspondence demonstrate. They followed that which was a convenient boundary, and that is the reason why the boundary of the Lake of the Woods was assumed.‡ And then the next commission, that of Lord Dorchester, followed that, and said the Mississippi went northward to the territories granted to the Hudson's Bay Company. You will find that the commissions neutralize one another.§

Lord Aberdare.—It is good so far as the Lake of the Woods goes, and covers a very considerable territory.

*The French contention was, that after the Treaty of Utrecht, the British were entitled to have restored to them only certain posts on the shores of the Bay, with a very limited dependent territory, and that the whole of the interior country with its forts or settlements was left to the French. The company made no move into the interior until long after the cession of Canada, and then only in pursuance of their right in common with other British subjects. They found the country occupied by traders, British subjects, of Canadian or British origin, ultimately united as the North-West Company of Montreal, whose footsteps the Hudson's Bay Company were contented to follow, at a measurable distance. In 1821, the two companies, jointly, obtained a Royal License to trade, under which their operations were carried on until their fusion, in 1838, into one company. And see *ante*, p. 237, note *; and appendix B, hereto.

†The Red Lake in question, as admitted by counsel at a subsequent stage of the argument, was not that near the sources of the Mississippi, referred to in the Haldimand correspondence, but was situate several degrees further north, to the north-eastward of Lake Winnipeg, and discharged its waters by a tributary of the English River.

‡See *ante* pp. 107, note *, and 222, note †.

§This contention does not appear to be supported on a comparison of the texts of the several commissions (Joint Appendix 375, 384, 387, 400, 404-6, 428), any apparent differences being explainable.

Mr. McCARTHY.—I will go to it now, if your Lordships like, but I think it will be more convenient to treat of that by itself. The beginning of the present century, 1800, comes. The first thing that we know is done, is this. This is very important, and to my mind it seems to put an end to the claim made by the other side. Lord Selkirk, in 1808 or thereabouts, proposed to found a colony on the Red River, and, in 1814, a grant was made to him by the Hudson's Bay Company.* Now will your Lordships look at the limits of that grant? The map I handed in this morning shews the limits of the grant to Lord Selkirk. It follows the height of land, as the southern boundary, until it comes to the height of land upon the east. It is all traced on the map. It goes considerably west of the present Province of Manitoba, then it goes southerly to the height of land, then it takes the height of land as its boundary until it comes to the height of land near Pigeon River.

Sir ROBERT COLLIER.—How does it appear that it is bounded by the height of land.

Mr. McCARTHY.—It is stated so in the grant to Lord Selkirk. Macdonell's proclamation sets it out.†

The LORD CHANCELLOR.—That is to the United States boundary?

Mr. McCARTHY.—At that date it went beyond the United States boundary.

The LORD CHANCELLOR.—Is that the boundary settled by the Ashburton Treaty?

Mr. McCARTHY.—Yes, your Lordship will find the proclamation at page 589.

Sir ROBERT COLLIER.—It commences in 52° 30′ north latitude.

Mr. McCARTHY.—"Thence running due west to Lake Winipigashish."

Lord ABERDARE.—It seems to go right through Lake Winnipeg.

Mr. McCARTHY:

"Then in a southerly direction, through the said lake, so as to strike its western shore in latitude 52 degrees; then due west to the place where the parallel of 52 degrees north latitude intersects the western branch of Red River, otherwise called Assiniboine; then due south from that point of intersection, to the height of land which separates the waters running into Hudson's Bay from those of the Missouri and Mississippi Rivers; then in an easterly direction, along the height of land, to the source of the River Winnipic, (meaning by such last named river the principal branch of the waters which unite in the Lake Saginagas)"—

That brings us down to the point marked on the map, the westerly limit of the height of land; then it follows the stream, which was the line of separation between the United States and Canada, until it gets to the point of commence-

*Lord Selkirk had become principal partner in the company, and they purported to make the grant in 1811; but it did not follow that it carried with it any title. The Canadian traders, who had been in exclusive possession of that territory long before any one in the interest of either the company or Lord Selkirk had set foot within it, treated the pretended grant with contempt, repudiated his lordship's assumed authority, and broke up his colony.

†PROCLAMATION OF MILES MACDONELL, DATED AT FORT DAER [Pembina], 8 JANUARY, 1814.

[*Extract—Description of the Boundaries.*]

All that tract of land or territory, bounded by a line running as follows, viz.: Beginning on the western shore of Lake Winnipic, at a point in fifty-two degrees and thirty minutes north latitude; and thence running due west to Lake Winipigashish, otherwise called Little Winnipic; then in a southerly direction through the said lake, so as to strike its western shore in latitude fifty-two degrees; then due west to the place where the parellel of fifty-two degrees north latitude intersects the western branch of Red River, otherwise called Assiniboine; then due south from that point of intersection to the height of land which separates the waters running into Hudson's Bay from those of the Missouri and Mississippi Rivers; then in an easterly direction along the height of land to the source of the River Winnipic (meaning by such last-named river the principal branch of the waters which unite in the Lake Saginagas); thence along the main stream of those waters, and the middle of the several lakes through which they pass, to the mouth of the Winnipic River; and thence in a northerly direction through the middle of the Lake Winnipic, to the place of beginning; which territory is called Assiniboia.

ment, taking in, acknowledging, and treating the land up to that point as if the property of the Hudson's Bay Company, and relying on the height of land as the boundary:

—"which territory is called Assiniboia, and of which I, the undersigned, have been duly appointed governor."

The LORD CHANCELLOR.—Where is there mention made of the boundary between that and the United States?

Mr. MCCARTHY.—It was not known then.* That took in a large part of the United States territory.

Lord ABERDARE.—It conveys the district of Louisiana.

Sir ROBERT COLLIER.—It goes below the boundary of 1763.†

Mr. MCCARTHY.—We do not at all acknowledge that line. These lines are not yet proved to your Lordships.

The LORD CHANCELLOR.—It is to be regretted, if there is anything disputed as to this map [*meaning the Ontario boundary map of 1884*], that it has been before us all the time.

Mr. MCCARTHY.—All we admit is, that the general lines of the country are correct—the rivers, the latitude and longitude.

Lord ABERDARE.—You do not admit that particular line?

Mr MCCARTHY.—No.

Mr. MOWAT.—This map shews what we say was the treaty of 1763.

Lord ABERDARE.—You inserted no maps on account of the difficulty of agreeing?

Mr. MCCARTHY.—We could not do it. We agreed about the maps that each side should put in—such maps as they thought tended to prove their case.

In 1814, the company bounded their grant to Lord Selkirk, on the south by the height of land; they carried that as far as where Pigeon River takes its rise, and then they pursued the watercourse along into Lake Winnipeg, to the place of commencement, adopting the water line as the actual southern boundary of their territory.

The LORD CHANCELLOR.—It is all to the west of the land now in question.

Mr. MCCARTHY.—No, it is south of the disputed territory. Your Lordships will see it very clearly in Keith Johnston's Physical Atlas. It shews the heights of land and water systems very plainly.

The LORD CHANCELLOR.—Something is assumed with regard to it in 1814. The claim certainly includes part of that which in the Quebec Act is confined to the Province of Quebec.

Mr. MCCARTHY.—We submit not.

The LORD CHANCELLOR.—Beyond all question. A line drawn from the source of the Mississippi would cut off a part of that.

*The boundary *was* known, for it appears in the Treaty of 1783, and in the Commission of 1786, as drawn through the water communications from Lake Superior to the most north-western point of the Lake of the Woods. The Selkirk grant purported to take in what must have been known to the parties even then as territory of the United States, namely, the tract bounded on the north by the said water communications, on the south by the height of land, and on the west by a line drawn from the Lake of the Woods to the source of the Mississippi, then sufficiently known and determined through the labours of Mr. David Thompson, astronomer and surveyor to the North-West Company, who had located it at Turtle Lake, as early as 1798. It is rather significant that this pretended grant included no part of the territory afterwards assigned to Ontario, by the arbitrators' award, and by Her Majesty in Council—except an insignificant area between the main channel of the Lake of the Woods and the line of the north-west angle, which would have been excluded also if the most north-western point of that lake had not been finally located at a spot considerably to the southward of the place (Portage aux Rats) where it was at first assumed to be. The parties to the grant were evidently aware that the southern boundary, and the territory, of Upper Canada extended to the Lake of the Woods, by virtue of the said Commission and of the instruments of 1791 and 1774. The inclusion of United States territory in the grant is, in face of the facts, hard to explain.

†Meaning the boundary line, shewn on the map, running due west from the source of the Mississippi.

Mr. McCarthy.—It goes straight to the Company's territory. The Commission of 1774, says following the eastern bank of the Mississippi to its source, and then northward to the Hudson's Bay territory. If the Hudson's Bay territory is bounded by the height of land, it strikes the height of land, and that ends it.

Lord Aberdare.—This map of Johnston's shews the river systems.

Mr. McCarthy.—The Mississippi goes up to Lake Itasca. Lake Itasca is south of the height of land. Then from that you go due north to the Hudson's Bay territory. That, as we contend, is at the height of land. Now we offered this as evidence, that in 1814 this was treated by the Hudson's Bay Company as their land, and granted. I submit it is some evidence. Your Lordship will see also it was up to that height of land that Upper Canada exercised jurisdiction. Upper Canada never claimed to exercise jurisdiction beyond the height of land.

The Lord Chancellor.—We have at present no evidence whatever of this.

Mr. McCarthy.—My learned friend Mr. Mowat contended for that.* Johnston's Physical Atlas seems to me to shew the height of land very nicely, at plate 17. It shews the river systems. Afterwards, this tract was made into a formal colony. The Hudson's Bay Company exercised the power of life and death. They appointed a judge—the present Judge Johnson of the Province of Quebec. They called him Recorder, but he was a judge there. He is still living. That is the place called Assiniboia. The headquarters were Fort Garry. The colony, as they called it, was that limit confined on the south by the United States line. Within those limits was the colony. He actually continued there until it was taken possession of under the Dominion Act, after the Rupert's Land Act was passed, and after the country was taken over by Canada.†

* The Attorney-General did not at all restrict himself to the height of land. See his argument, *ante*, pp. 97-106.

† The Hudson's Bay and North-West Companies, which had, jointly, rights of exclusive trade under the license of 1821, amalgamated in 1838, and continued conjointly in the enjoyment of their exclusive rights, under the renewed license of that year; but in the name of the Hudson's Bay Company only, thus enabling them to wield, in addition to the rights conferred by the license, all the powers and privileges of the charter. The license covered as well the charter territories as the Indian territories; but no limits having been defined, whether of Canada, or of the Indian or the Hudson's Bay Company's territories—either within themselves respectively, or as against each other—and Upper Canada, though claiming, not then finding it actually necessary to exercise territorial jurisdiction in regions so remote from her settled parts, the company assumed to exercise rights of ownership, administration of justice and government, held under the charter alone, in regions clearly beyond its scope, and wherein they either had no exclusive privileges whatever or those only conferred by the license, as the case might be. That neither the so called district of Assiniboia, nor any portion of the Winnipeg basin, was embraced within the limits of the charter, is clear upon the evidence. The North-West had been in the actual occupation of France, an integral part of Canada, and in 1763 was ceded, with the other French possessions, to the Imperial Crown of Great Britain, and in 1791, by virtue of various acts of authority, was included, Ontario claimed, within the Province of Upper Canada (As to the reasons for the limitation, at the present day, of the western boundary of Ontario to the Lake of the Woods, see note to the award, appendix A, hereto). To whatever category then, the region might be assigned—territory of Upper Canada, or of the Indians, or of the Imperial Crown—it certainly was not territory covered by the charter of the Hudson's Bay Company. The company were therefore there exercising an usurped authority; nor, in the case of Mr., now Judge, Johnson, does the manner of its exercise appear to have been even in accord with the charter, which provides, not that a recorder or judge, but, "that the governor and his council, of the several and respective places where the said company shall have plantations, forts, [etc.] . . within any of the countries . . hereby granted . . may have power to judge all persons . . . in all causes, whether civil or criminal, according to the laws of the Kingdom, and to execute justice accordingly." In law then Mr. Johnson had no authority whatsoever. It may be, although there is no allusion to it in his evidence, that his real position was that of assessor, to sit with and advise the governor and council whenever they were engaged in administering justice. It is to be remembered that under the Acts of 1803 and 1821, the above provision of the charter was supplemented by giving to the Canadian courts jurisdiction, as well in the Hudson's Bay as in the Indian territories, with the necessary machinery for its proper exercise, and that by the last mentioned Act the Crown reserved the power of erecting, should it be so advised, courts of record, etc., within the territories themselves. In the *ex parte*, *viva voce*, examination of Judge Johnson, referred to by counsel later on in the argument, the impression is sought to be conveyed that the company was recognized by the Crown as rightly possessing the powers claimed by them in Assiniboia; but the circumstances relied upon wholly fail to establish this contention. One reason for the despatch of troops to the point, is given by the witness himself, viz., the agitation in connection with the Oregon Question, and the desirability of having the troops on hand in case of trouble ensuing, and another reason, that they were needed for protection from the Indians and the maintenance of order. But besides this, it is to be presumed that the government, as in this case, would be prepared to

The LORD CHANCELLOR.—Where is Fort Garry ?

Mr McCARTHY.—Fort Garry is now Winnipeg. Then the history of Lord Selkirk's colony is this. He commenced to colonize in 1808. The grant was made in 1814.* He brought a number of people out from Scotland. Very shortly after that, or about that same period, the traders from Montreal—the individual men who had been trading, and who had been operating as rivals to one another—combined, and they became an incorporated company.

Mr. MOWAT.—It was long before that—half a century before.

Mr. McCARTHY.—I will give you the exact date.

The LORD CHANCELLOR.—Is it not the fact that the respective claims of those companies were in controversy for a long time, and that the then Governor of Canada did not very much favour Lord Selkirk's pretensions ?

Mr. McCARTHY.—No, they were not in controversy to that extent. I accept your Lordship's statement; but all the Governor did was to accept neutrality.* Your Lordship will see that at that time it was very much doubted whether the charter of the Hudson's Bay Company gave them a right to exclude others from trading there. Every opinion I have seen concedes that the Hudson's Bay Company's grant of land was good. The contention they put forward, that they had the exclusive right to trade, was in practise opposed by those men who afterwards joined together and became the North-West Company, and the English authorities, the Governor-General, or his subordinates, were directed not to interfere in that dispute. That was not a dispute about the territory. The North-West Company had no grant of land. They were a company incorporated in the city of Montreal, simply for trading purposes, and they went into the North-West and traded. The Hudson's Bay Company said: You have no business to trade here; we are not merely the owners of the soil, but we have the exclusive right to trade, and you are all trespassers; and civil war ensued. Those disputes went on from day to day, and in one battle the Hudson's Bay Company's governor, Semple, and twenty-nine men, were killed. There was another fight at the Dalles, which afterwards gave rise to the trial of De Reinhard for murder in the Province of Quebec. All that the correspondence shews is, that the Governor-General was not to interfere to recognize Lord Selkirk's rights, nor the Hudson's Bay rights, nor the North-West Company's rights.† He was to observe neutrality,

grant to any *de facto* settled community, such as this one at Red River was, protection against the Indians, were it required. Thus in 1816 a guard of regulars was even put at the disposal of the Earl of Selkirk, for his protection in passing through the Indian country. On that occasion, the officer in charge was officially instructed not to take part in the disputes then existing between the Earl and the North-West Company, as each party was deemed equal in the view of the government (Joint App. 207); subsequently, in 1817, the Earl having interfered with the trade and seized the property of the North-West Company, the Prince Regent caused orders to be issued for a mutual restitution of all forts and property seized, and for the removal of all interruptions to the freedom of trade (*Ib.* 204-5, *infra*, note); in 1857, the Imperial law officers pointed out the uncertainty regarding the company's boundaries (Joint App. 616); and as late as 1869, Earl Granville, Secretary of State for the Colonies, caused the company to be informed that: "At present the very foundations of the company's title are not undisputed. The boundaries to its territories are open to questions of which it is impossible to ignore the importance." (*Ib.* 302). These utterances had all special reference to the North-West.

Needless to suggest that the Imperial authorities were not likely to have been prepared, in Mr. Johnson's time, to concede, *ex parte*, without investigation or enquiry, or a decision of the Sovereign in Council, the exclusive territorial pretensions put forward on behalf of the company in respect of Assiniboia or any other section of the North-West.

*The grant, so called, to Lord Selkirk was in 1811.

†But the Prince Regent, in 1817, commanded the Governor-General to issue a proclamation requiring that, pending the adjudgment of the question of right, each of the parties "be restored to the possessions held by them previous to the commencement of the recent disputes," and "the restitution of all forts, buildings or trading stations (with the property which they contain) which may have been seized," and "the removal of any blockade or impediment by which any party may have attempted to prevent or interrupt the free passage of traders, or others of His Majesty's subjects, or the natives of the country, with their merchandize, furs, provisions and other effects, throughout the lakes, rivers, roads, and every other

because it was a proper question of law, and it was stated that the North-West Company were bringing the matter to the test of legal decision. Then, what followed? The Act of Parliament of 1821 gave power to the government to give an exclusive license to trade to any body corporate, or company, or person or persons. That was the position of it. That license was renewed in 1838. It was in 1821 it was first granted,* after the statute of that year, to the Hudson's Bay Company, and to three gentlemen who represented the North-West Company. In 1838, that license was renewed to the Hudson's Bay Company alone,* because the others had become shareholders in the Hudson's Bay Company. That continued until 1857, and then it was becoming obvious that this country could not be closed up by the Hudson's Bay Company against the advancing tide of settlement coming from Canada on the east. Communications were opened up between the British and Canadian governments, which finally led to the passage of the Ruperts Land Act, which distinctly recognizes and incorporates, for the purposes of that Act, and of that transfer, all that the Hudson's Bay Company then possessed, or claimed, for the very purpose of settling this dispute as to boundary.

So, here we find that the Hudson's Bay Company were *de facto* in possession. We find that, at all events, they claimed it as I pointed out, in the most solemn documents recognized by the authorities, and then the Act of Parliament was passed saying that Rupert's Land shall, "for the purposes of this Act." mean all that the company "held or claimed" at any time. I think the words are as large as possible; and the colony of Rupert's Land was added to the confederated provinces of Canada.† That is, generally, the outline of the position we take with regard to that. I am reaching that point gradually. What I was going to refer to was the Acts of Parliament of 1803 and 1821. The Act of 1803 is to be found at page 406 of the Joint Appendix.

The LORD CHANCELLOR.—I have been endeavouring to follow the limits of the Hudson's Bay grant to Lord Selkirk, as stated at page 589,‡ and I cannot make it out that it includes any country to the east of the Red River.

Mr. MCCARTHY.—Has your Lordship got down to the height of land?

The LORD CHANCELLOR.—Yes. It begins at a point on the western shore of Lake Winnipeg.

Mr. MCCARTHY.—Perhaps my learned friend would admit it. [*To Mr. Mowat*]: Do you not admit that the grant to Lord Selkirk goes down to Pigeon River—the height of land, past Pigeon River?

The LORD CHANCELLOR.—Following the boundary as here described, it seems clear that it does not.

Mr. MCCARTHY.—It goes down to the source of Lake Winnipeg. That is what it says.

The LORD CHANCELLOR.—The source of the Winnipeg River it means.

Mr. MCCARTHY.—It says: "meaning by such last named river the principal branch of the waters which unite in the Lake Saginagas." That is the point. That is close to Pigeon River.

Lord ABERDARE.—That is exactly where the height of land comes in.

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usual route or communication heretofore used for the purposes of the fur trade in the interior of North America," etc.—all of which was aimed at the Hudson's Bay Company, or their grantee, Lord Selkirk, who only had perpetrated the acts and violences here condemned. See the despatch *ante*, p. 162, note.

*Extracts from the licenses are printed *ante*, pp. 64, 65, notes.

†What was added to Canada was, not Rupert's Land alone, but the North-Western Territory and Rupert's Land, and that without definition of the boundaries of either.

‡Printed *ante*, p. 239, note †.

The LORD CHANCELLOR.—I cannot follow the limits. The limits as they are laid down are, first of all, beginning on the western shore of Lake Winnipeg, at a certain point; then running due west to Lake Winnipegoosis; then in a southerly direction through the lake.

Mr. MCCARTHY.—No, that is not the course. You still go westward, only a little bit south.

The LORD CHANCELLOR:

"Then in a southerly direction through the said lake so as to strike its western shore in latitude 52 degrees; then due west to the place where the parallel of 52 degrees north latitude intersects the western branch of Red River, otherwise called Assiniboine."

I see that by the dotted line:

"Then due south from that point of intersection to the height of land which separates the waters running into Hudson's Bay from those of the Missouri and Mississippi Rivers."

I find the height of land laid down:

"Then in an easterly direction, along the height of land, to the source of the River Winnipic, (meaning by such last named river, the principal branch of the waters which unite in the Lake Saginagas.)"

Now, the River Winnipeg, I should have supposed, would have been the river which ran into the Lake Winnipeg, but supposing it does not, where is the river that is mentioned?

Lord ABERDARE.—The River Winnipeg flows into Lake Winnipeg, immediately above the Red River, and comes out of the Lake of the Woods, which lake itself is connected, by what flows through a series of lakes, with Lake Saginagas.

The LORD CHANCELLOR.—You are brought to the source of the River Winnipeg, which means, as I understand, in substance, the easterly branch of the Red River.

Mr. MCCARTHY.—No.

Sir ROBERT COLLIER.—The River Winnipeg seems to rise in a very small lake. [*Their Lordships referred to the maps.*]

The LORD PRESIDENT.—It would look as if the whole of that water communication, from Saginagas, was included under that head. It all runs into it.

The LORD CHANCELLOR.—It was suggested that certain waters did unite in that lake, Saginagas, and the principal branch of it is close to Pigeon River.

Mr. MCCARTHY.—The Ontario map marks it down. The line we put is only to shew it more distinctly.

Mr. MOWAT.—We have marked it correctly on our map.

Lord ABERDARE.—These rivers often have a variety of names.

Mr. MCCARTHY.—It is not open to controversy, so far as the other side are concerned. They have marked it on their own map.

Then, my Lord, I will recur again to the position of the Hudson's Bay Company; but I now wish to draw your Lordships' attention to the Acts, which appear to me to have some little bearing with reference to the disputes at that time.

The LORD CHANCELLOR.—What Acts?

Mr. MCCARTHY.—First, the Act of 1803.*

The LORD CHANCELLOR.—You referred to that before.

* Imp. Act, 43 Geo. 3, cap. 138 (1803). An Act for extending the jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the trial and punishment of persons guilty of crimes and offences within certain parts of North America adjoining to the said Provinces.

Mr. McCarthy.—It was under that Act that the De Reinhard trial took place, and the question in the De Reinhard trial, your Lordships will see, was merely as to the due north line.

The Lord Chancellor.—That turns on the adoption, by the learned judge, of the line from the confluence of the Rivers Mississippi and Ohio. If that is not right, that decision ceases to be any authority.

Mr. McCarthy.—As far as this goes, the only way it becomes important of course is, that there was a trial in Quebec of this offence committed under that Act, assuming, of course, that it was outside the jurisdiction of Upper Canada. Of course Quebec did not reach there. It is either Upper Canada, or the Indian territory, and it was on the assumption that it was not in Upper Canada. A similar trial took place in Upper Canada, which resulted in a verdict of not guilty, and therefore there was no point in it beyond the one I am going to speak of. That will be found at page 685 of the Joint Appendix.

The Lord Chancellor.—Was this a trial under the Act of 1803?

Mr. McCarthy.—Yes; this was the case of *Brown and Boucher*, in 1818. It commences at the foot of page 685, and the only importance of that case—and it is important in that view—is, that if this was Upper Canada then the Crown officer should not have prosecuted the case under the Act of 1803.*

The Lord Chancellor.—Was the precise spot where that question arose fixed?

Mr. McCarthy.—It was a trial for the murder of Governor Semple, which took place at the battle of Frog Plains.

The Lord Chancellor.—Was the spot decided where the murder took place?

Mr. McCarthy.—It is close to what is now Winnipeg.

The Lord Chancellor.—That would not affect it.

Mr. McCarthy.—Not if the award is taken as being anything, but your Lordships, if I may say so, were dealing with it as if the award were of some validity.

The Lord Chancellor.—Not the least in the world. The question is, what is the true boundary? It is immaterial, but we get any assistance from the award we can.

Mr. McCarthy.—What I am pointing out is that if not, it makes no difference in our contention whether the statutable offence took place east or west of the awarded line.

The Lord Chancellor.—That is to say, if you have established the fact that the boundary is what you allege, whatever that may be, then it may be perfectly indifferent; but the question we have to determine here is, whether or no the boundary is one which gives to Ontario the whole or only part of what has been given to Ontario. Then the place where this alleged murder took place is, as I understand it, in what is admitted to be Manitoba.

Mr. McCarthy.—Your Lordship will pardon me. The question, as I understand it now, is, if the award be invalid, what is the true boundary?

The Lord Chancellor.—True. We have practically decided in your favour the attempt to push the boundary of Canada indefinitely to the west, and you

* But Chief Justice Powell, in his Charge, expressed himself thus:—

"It only remains that we consider our jurisdiction connected with locality. To give us a right to try them under the Act upon which they are indicted, the offence must have been committed out of the limits of this Province; whether we have a right or not, I declare I am at a loss to decide. Mr. Attorney-General has put in evidence the latitude and longitude of the Frog Plains, but he does not put in the evidence whether this latitude and longitude is without or within the boundaries of Upper Canada, and I do not know whether from 90° to 109° or 150° form the western limit of Upper Canada, nor do I know whether a place at that longitude, and having 49° or 49½° north latitude, is within the Province of Upper Canada, or beyond its boundaries."

may assume, I think—at least it is my impression, and I think the view of their Lordships—that we shall not carry it further to the west than the award has carried it. Whether we shall carry it so far must depend on the effect of the argument.

Mr. McCarthy.—Perhaps your Lordship will allow me to state my position. If the height of land is not the true line, then I fail to see—and I state, on my part, that I fail to see—any evidence of where the true line is.

The Lord Chancellor.—We have got—and your attention was called to this at the beginning—certain boundaries mentioned in the Quebec Act, and in the contemporaneous, or nearly contemporaneous, documents. We are in search of those boundaries.

Mr. McCarthy.—If I may go back to the Quebec Act again, and assuming, in the view I am arguing for, that the true construction is to follow the Mississippi River, then it ends at the territory granted to the Hudson's Bay Company.

The Lord Chancellor.—Very likely; and I quite follow the argument, that having got to the head of the Mississippi River, striking north from that you reach the boundary which you call the height of land. I quite understand that argument, and will consider the weight to be attached to it; but, any way, that would exclude the alleged site of this particular murder.

Mr. McCarthy.—Between the place of the alleged murder, and the line of the north-west angle, there is nothing in all the papers—that is what I venture to assert—to shew any distinction, because the first commission does not speak of the north-west angle at all. It follows the construction which, for the present I am conceiving your Lordships are holding to be the proper wording of the Act, that is up to the Hudson's Bay territory. So that there is no difference whether it happened east or west of that particular line.*

The Lord Chancellor.—If it stopped there, then you might say that that is true. I do not follow it, because it is quite clear—at least it seems to me at present—that that would draw a line to the north, wherever that line stops, which would be east of Manitoba.

Mr. McCarthy.— What I mean to say is, that there is no suggestion of the southern boundary of the Hudson's Bay territory being at any point or place where a line from the north of the Mississippi would strike or make any difference as to this particular offence.

The Lord Chancellor.—I cannot agree with you. Whether the line drawn north from the head waters of the Mississippi strikes what you call the height of land, or whether it continues further north, any way it would cut off this particular spot to the west.

Mr. McCarthy.—If it goes north, of course.*

The Lord Chancellor.—Either way, this particular spot would be to the west.

Mr. McCarthy.—But what I said, and I think your Lordship agreed in that contention, was, that it was the southern boundary of the Hudson's Bay land that we are endeavouring to find. I say there is no suggestion of any southern boundary of the Hudson's Bay land which makes any difference whether the offence was committed to the east or west of the north-west angle of the Lake of the Woods.*

The Lord Chancellor.—We are endeavouring to find the point where the line mentioned in the Quebec Act would strike the southern boundary.

* The commission of 1786 (*ante* p. 44) carried the southern boundary of Quebec, and therefore of Upper Canada, through and beyond the height of land, as far west at least as the most north-western point of the Lake of the Woods, and consequently the southern boundary of the company's territory would have, on that authority alone, to be looked for somewhat to the northward of that point.

Mr. McCarthy.—We have to find that, to get the point. There is nothing to shew that there is any point of the Hudson's Bay territory that could be struck, if it be not the height of land, where it would make any difference whether this offence was committed east, or west, of the north-west angle, and therefore, I submit it is an authority, where we find a court of Upper Canada trying an offence committed there, at that date, not upon their own law, but under the Act of 1803.* It did not require to be decided.

The Lord Chancellor.—That is begging the whole question.

Mr. McCarthy.—No, my Lord. Perhaps I do not make myself clear. What I mean is this—is that in Upper Canada?

The Lord Chancellor.—The thing is, that you assume that it was not Upper Canada, if that is in your favour—that what was then Manitoba is not Upper Canada.

Mr. McCarthy.—What I am endeavouring to point out to your Lordships is, that, in point of principle, there was no distinction between the land admitted to be Manitoba and the land immediately to the east of that.

The Lord Chancellor.—You cannot make out that because upon the Manitoba territory a certain murder is committed it is held not to be within Ontario.

Mr. McCarthy.—It is only a further fact.

Now, my Lords, I have gone over the whole history, and what I submit is, that there is nothing, anywhere, which would enable a surveyor to draw a line that would strike the north-west angle of the Lake of the Woods and join that which is the southern boundary of Hudson's Bay.†

Sir Montague Smith.—Can you have it much more than that the whole of what is admitted to be Manitoba is admitted not to be Canada.

Mr. McCarthy.—I only want it as the principle. It is not the territory. The point I desired to make was this—

Sir Montague Smith.—I quite understand you. You say it proves that this part was not Canada, and proving that that is out of Canada, we should come to the conclusion that that north-west angle is not in Canada, because the line must be taken as the watershed. It goes no further than that.

Mr. McCarthy.—I do not contend that it does.

Then I come to the Act of 1821, which your Lordships will see at page 417‡ of the Joint Appendix. That was an Act having a two-fold object. When the Act of 1803 was passed, it was intended to give jurisdiction to the courts of Canada over all offences outside the limits of either of the provinces; apparently also, to include the Hudson's Bay territory. Between 1803 and 1821, this difficulty suggested itself: By the charter to the Hudson's Bay Company they had courts, and power to constitute courts, and they had constituted courts, and the difficulty that suggested itself was—had this Act of 1803 sufficiently and explicitly declared that the intention of Parliament was that the Canadian courts should have jurisdiction over offences arising in that territory? For that purpose the doubt was cured, and then it in point of fact acknowledges—which I need not trouble your Lordships with after what your Lordship has said—the Hudson's Bay Company's rights in a certain sense, and finally it goes on to say that even though offences may be committed within the jurisdiction of the Hudson's Bay

*The question of jurisdiction arose, and the Court was doubtful of its own powers, the Chief Justice remarking: "Whether we have a right or not, I declare I am at a loss to decide," and the jury were directed, in consequence, to find, in the event of the guilt of the prisoner being established, a special verdict in respect of the boundaries, to this effect: "We cannot see, from any evidence before us, what are the limits of Upper Canada." The trial resulted in a verdict of not guilty, and the question of the limits did not therefore require to be pursued any further.

†See *ante*, p. 246, note.

‡Imp. Act, 1-2 Geo. 4, cap. 66 (1821). An Act for regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within certain parts of North America.

Company's lands, that nevertheless they shall be triable under the Act of 1803; and it also deals with the fur trade. The recital there is not unimportant:

"Whereas the competition in the fur trade between the Governor and Company of Adventurers of England trading into Hudson's Bay, and certain associations of persons, trading under the name of 'The North-West Company of Montreal,' has been found, for some years past, to be productive of great inconvenience and loss."

and then it goes on to describe that, and the feuds that took place between them:

"And whereas many breaches of the peace, and violence, extending to the loss of lives, and the destruction of considerable property, have continually occurred therein: And whereas, for remedy of such evils, it is expedient and necessary that some more effectual regulations should be established, for the apprehending, securing and bringing to justice all persons committing such offences,"

and so on. Then it recites the Act of 1803, and then the enacting clause is, that

"It shall be lawful for His Majesty, his heirs or successors, to make grants, or give his Royal license, under the hand and seal of one of His Majesty's Principal Secretaries of State, to any body corporate, or company, or person, or persons, of or for the exclusive privilege of trading with the Indians in all such parts of North America as shall be specified in any such grants or licenses respectively, not being part of the lands or territories heretofore granted to the said Governor and Company of Adventurers of England trading to Hudson's Bay,* and not being part of any of His Majesty's provinces in North America, or of any lands or territories belonging to the United States of America, and all such grants and licenses shall be good, valid and effectual,"

and so on. Then:

"Provided always, and be it further enacted, that no such grant or license, made or given by His Majesty, his heirs or successors, of any such exclusive privileges of trading with the Indians in such parts of North America as aforesaid, shall be made or given for any longer period than twenty-one years, and no rent shall be required or demanded for or in respect of any such grant or license, or any privileges given thereby, under the provisions of this Act, for the first period of twenty-one years."

And then there is something more, with reference to rents. Then the third section says:

"That from and after the passing of this Act, the Governor and Company of Adventurers trading to Hudson's Bay, and every body corporate, and company, and person to whom every such grant or license shall be made or given as aforesaid, shall respectively keep accurate registers of all persons in their employ in any part of North America, and shall, once in each year, return to His Majesty's Secretary of State accurate duplicates of such register, and shall also enter into such security as shall be required by His Majesty, for the due execution of all processes, criminal and civil, as well within the territories included in any such grant as within those granted by charter to the Governor and Company of Adventurers trading to Hudson's Bay, and for the producing or delivering into safe custody, for purposes of trial, of all persons in their employ, or acting under their authority, who shall be charged with any criminal offence."

Then it speaks of the convention between His Majesty and the United States, which does not appear to me to be important, and of the other Acts with regard to that, which were passed for the trial of offenders. The first Act, of 1803, gave

* It is somewhat strange that whilst the Act thus provides for excepting the Hudson's Bay Company's territories from the proposed license, the license itself makes no such exception, and covers therefore as well the Company's as the Indian territories. Was this done with the object of curing the suggested invalidity of the Company's monopoly of trade under the charter?

power to issue commissions, and under that Act one of the justices of the peace was Lord Selkirk. That is, they had power to grant commissions, under the Act of 1803, for the purpose of apprehending offenders, in order to permit of their trial under that Act in the courts of Canada, and under that Act Lord Selkirk, and all the principal men of the Hudson's Bay Company, were appointed magistrates and justices of the peace.

Now follows the license, at page 421, and it recites the Act which I have just partly read to your Lordships, and the powers of the Act. At page 422, line 22, it says:

"And whereas the said Governor and Company of Adventurers of England trading into Hudson's Bay, and certain associations of persons, trading under the name of the North-West Company, of Montreal, have respectively extended the fur trade over many parts of North America which had not been before explored: And whereas the competition in the said trade has been found for some years past to be productive of great inconvenience and loss, not only to the said company and associations, but to the said trade in general, and also of great injury to the native Indians and of other persons our subjects: And whereas the said Governor and Company of Adventurers of England trading into Hudson's Bay, and William McGillivray, of Montreal, in the Province of Lower Canada, Esquire,"—and so on, naming them—"have represented to us that they have entered into an agreement, on the 26th day of March last, for putting an end to the said competition, and carrying on the said trade for twenty-one years, commencing with the outfit of 1821, and ending with the returns of 1841, to be carried on in the name of the said Governor and Company exclusively: And whereas the said Governor and Company and William McGillivray, Simon McGillivray and Edward Ellice, have humbly besought us to make a grant, and give our Royal License to them jointly, of and for the exclusive privilege of trading with the Indians in North America, under the restrictions and upon the terms and conditions specified in the said recited Act, Now, know ye, that we, being desirous of encouraging the said trade and remedying the evils which have arisen from the competition which has heretofore existed therein, do grant and give our Royal License, under the hand and seal of one of our Principal Secretaries of State, to the said Governor and Company, and William McGillivray, Simon McGillivray and Edward Ellice, for the exclusive privilege of trading with the Indians in all such parts of North America, to the northward and westward of the lands and territories belonging to the United States of America as shall not form part of any of our provinces in North America, or of any lands or territories belonging to the said United States of America, or to any European government, state or power; and we do by these presents give, grant and secure to the said Governor and Company, William McGillivray, Simon McGillivray and Edward Ellice, jointly, the sole and exclusive privilege, for the full period of twenty-one years from the date of this our grant, of trading with the Indians in all such parts of North America as aforesaid."

The Lord Chancellor.—What is it you rely upon there?

Mr. McCarthy.—I rely upon that as an adoption by Parliament and the Government, of the agreement putting an end to competition between the Hudson's Bay Company and the North-West Company, who were the only persons disputing the right of the Hudson's Bay Company to the country which they claimed under their charter,* and a license is granted thereupon to the united bodies.

*This statement, taken by itself, might prove misleading. For the North-West Company, at the time referred to, was not what is ordinarily understood by the term "company": on the contrary it embraced, in one stupendous aggregation, the interests of all the British and French-Canadian traders, whether individuals or corporations, (other than the Hudson's Bay Company,) who had been doing business in those regions in succession to the old French explorers, many of whose posts they continued to keep. The Company is described in the Imperial Act of 1821, quoted in the text, as "certain associations of persons, trading under the name of 'The North-West Company of Montreal.'" It obtained a transfer of the King's Posts

The LORD CHANCELLOR.—That is:

"For the exclusive privilege of trading with the Indians in all such parts of North America to the northward and westward of the lands and territories belonging to the United States of America as shall not form part of any of our provinces in North America."

How that tends to determine whether the particular part in dispute does or does not form part, I do not see.

Mr. MCCARTHY.—It goes perhaps more to the other point, as to the rights of the Hudson's Bay Company. That was renewed in 1838, as your Lordships will find on the next page, 423, to the Hudson's Bay Company alone, for twenty-one years.

Sir ROBERT COLLIER.—If that goes no further than this, it is not necessary to read it.

Mr. MCCARTHY.—I am not going to read it. It is to the company, instead of to the company and others.* Then the covenant by the Hudson's Bay Company to perform their part is on the following page.

Now, my Lords, pausing here for a moment in the history of the Hudson's Bay Company, I come back to endeavor to answer the arguments advanced by my learned friend. Your Lordships being satisfied as to the legality of the Hudson's Bay Company's charter, as to which I have several authorities, and the recognition of the charter in Acts of Parliament and by the British Government, in one case even in a treaty between them and the United States—

Sir ROBERT COLLIER.—You may assume that for the purpose of the argument.

Mr. MCCARTHY.—Then, the only point that it appears to me I have to answer is this, up to this stage; and that is the contention advanced by my learned friend, Mr. Mowat, and repeated by the learned counsel who followed him, that the trespassing, as we call it—the going upon this intermediate country, from Fort William westward, by the French, from 1719† upwards—had the effect of limiting and contracting what otherwise would be the measure of the lands granted to the Hudson's Bay Company. I deny, as a proposition of law, that that would be the proper conclusion to draw. There was the grant, in 1670, which, for the purpose of the British territory, so far as the Crown of Great Britain and the subjects of Great Britain are concerned, is, of its own strength, sufficient to grant all that is therein contained.‡ Although it may not have been of binding

from the Crown, and with them, access to Hudson's Bay. Its operations extended from the Atlantic coast of Labrador to the Pacific Ocean and the confines of Alaska; from the United States boundary to the Arctic. Its ramifications covered the whole territory, and its settled posts numbered three times as many as those of the Hudson's Bay Company. (See *post*, p. 292.) The "disputing the right of the Hudson's Bay Company to the country," by the North-West Company, is therefore to be taken as a disputing it by every interest outside the Hudson's Bay Company itself. The British Government also disputed it by disapproving the exclusive pretensions, unless they were established before the legal tribunals. (See *ante*, p. 161, and p. 162, note.) The people of the Red River disputed it, and urged their views upon the Imperial authorities. The Province of Canada disputed it and was largely instrumental in inducing the final and permanent settlement of the whole question.

* But it is recited that the company had "acquired to themselves all the rights and interests" of the gentlemen who represented the North-West Company. See extracts *ante*, p. 65, note*; and see p. 241, note†. In reality, the representatives of the two companies amalgamated, and agreed to carry on the joint business in the name of the Hudson's Bay Company alone.

†The French traders were in the region of the North-West as early as fifty years before this date. (Joint App., 463-4, 566.)

‡Ontario shewed that the French, from their first occupation of Canada, claimed and treated the regions of Hudson's Bay as comprehended within its limits; and occupied and utilized them in the only way and to the extent that such sparsely inhabited and inhospitable regions were susceptible of being occupied or utilized—that is by visiting the native Indians in their haunts, and drawing them, with their furs, for purposes of trade, to the marts of the St. Lawrence, or the posts established at or near—or even

efficacy as far as foreign powers are concerned, for the purposes of the subjects of Great Britain it is of binding effect, and therefore, when the Act of 1774 speaks of going to the territories granted to the Hudson's Bay Company—

Sir MONTAGUE SMITH.—The way the argument was put is this, that it does not limit the grant, but the grant itself puts that as a limit—countries not possessed by the subjects of a foreign power. It is not put as a limitation of the grant, but as a part of the exception in the grant itself.

Mr. MCCARTHY.—That is not the way I understood my learned friend's argument. The way I understood it was this—assuming for the sake of the argument that it does take in all the territory claimed by the Hudson's Bay Company, nevertheless, my learned friend argued, if we find the Hudson's Bay Company had occupied only two hundred miles from the shore and that French people had come up to that two hundred miles from the shore, that circumstance had changed and limited the grant. I say that that is not a good argument in law, because the charter, if it does—and I am assuming now for this part of the argument that it does—grant to the heights of land surrounding Hudson's Bay, is a good charter (no matter whether it is good as to foreigners or not) as to British subjects,* and when afterwards, in 1774, the Parliament, which had again and again referred to the Hudson's Bay Company, and on one occasion had expressly ratified the charter, speaks of the grant in this way, the Province of Quebec being limited on the north by the land granted to the Hudson's Bay adventurers, I should submit that nothing that happened between the French and the Hudson's Bay people could limit or affect the grant.

The LORD CHANCELLOR.—Is your proposition that if it was ever so clear that French Canada had included the *locus in quo*, and had been recognized as having done so by the British Crown, and the British Crown accepted it as part of the cession of French Canada, yet because you would argue from the charter given by Charles II. to the Hudson's Bay Company that it included the rivers up to their sources, therefore we are not to regard the boundary mentioned in the Quebec Act according to the facts, but according to the theory?

Mr. MCCARTHY.—Yes, my argument goes that far, on two grounds, first, as a matter of law, and secondly as a matter of fact.

The LORD CHANCELLOR.—It cannot be a matter of law.

Mr. MCCARTHY.—I mean a matter of law in this sense—if we find a grant in 1670 defining certain limits.

The LORD CHANCELLOR.—It does not.

Sir MONTAGUE SMITH.—"Not already actually possessed" by other people—then if in fact it was actually possessed.

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beyond—the height of land; and made a disposition of them by charter—to the Company of the Hundred Associates—as early as 1627, that is 43 years before the granting of the Hudson's Bay Company's charter, and even earlier than this, by a similar charter, to the De Caëns; and, moreover, made public assertions of her title from time to time, and made public acts of possession, in the presence and with the assent of the Indian natives; that France was, thus, not only constructively, but actually, in possession, and these territories, therefore, in the position of exception provided for by the Charter of King Charles, namely, "already actually possessed by or granted to any of our subjects or possessed by the subjects of any other Christian Prince or State." The Hudson's Bay Company both exceeded the powers purported to be conveyed by their own charter, and usurped the rights of France, by trespass on the French territory and the erection of some isolated posts on its remotest confines. These the French, in consistent maintenance of their established rights, moved against, and captured or destroyed. In strictness, then, the territorial grant was *ab initio* of non-effect, as having no subject matter to operate on.

*Ontario shewed that the charter did not at all purport to grant to the heights of land; and claimed that if the territorial grant was not void for uncertainty, or of non-effect for want of subject matter, or had not wholly lapsed as a consequence of the French successes and acquisitions conserved to them by the Treaties of Neutrality and of Ryswick, and the loss to the Company thereby of all rights of postliminy, it at all events was limited by the *de facto* possession of France and the other incidents of the French title; and see *ante*, pp. 190, note †, 235, note*. The theory that the grant extended to the heights of land was propounded for the first time in Lord Selkirk's time, 1811-1814. See *ante*, p. 191, note‡.

Mr. McCarthy.—It was not, at that time.

Sir Montague Smith.—I do not say it was, but if you find it was actually possessed, then the fact is doubtful.

The Lord Chancellor.—If you find that for years afterwards it was recognized as a French possession, and so treated by the British Crown, would not legal principles justify the presumption that it was a French possession?

Mr. McCarthy.—No, my Lord, I submit not, and I will tell you my reasons for it. The grant at that time was of all that territory. I am assuming now, as I must assume something for the sake of the argument, the limitation to which your Lordship has just referred, the grant was a grant of all the territory drained into Hudson's Bay. Then, what is the meaning of the grant in 1670, the day it was signed and sealed? It says, all that territory except such as was then in the possession of any other Christian power—not such as might a hundred years after pass into the possession of any other Christian power.*

The Lord Chancellor.—Do not the courts of law draw such inferences, even when individual minds are satisfied that the fact was otherwise? Has it not been the practice for courts of law to draw, from a hundred years' or very long possession, an inference of earlier possession, even when the probability of fact was not so?

Mr. McCarthy.—Yes. I am endeavouring to shorten my argument as much as I can; but, as a matter of fact, this is perfectly plain, and I will go on and prove it if your Lordships doubt it—that in 1670 the French were not in possession of an inch of that territory.†

The Lord Chancellor.—You cannot prove a negative.

Mr. McCarthy.—I can only prove it historically. I think there was no pretence that they had penetrated there at that date, or gone beyond the limits of the St. Lawrence watershed at that date.

The Lord Chancellor.—No facts that I am aware of are in any way proved which exclude the legal presumption from long possession.

Mr. McCarthy.—Unless the definite proof of when that possession commenced.

The Lord Chancellor.—There is no such proof.

Mr. McCarthy.—With all deference to your Lordship, I think there is.

The Lord Chancellor.—But you deny the fact of possession altogether.

Mr. McCarthy.—Yes, my Lord, I say there is no proof that there was any possession of any country which was not drained by a part of the St. Lawrence, prior to 1670.‡ I start with that. Now, if it be necessary, I will go back and prove that to your Lordships, so far as we can trace it from the historical documents which are left to us. What were the French pretensions? The French pretension was, that they had discovered Hudson's Bay, and by virtue of that discovery they claimed that they had a better right than the English. The English said that they had discovered it, and I assumed on Thursday, and I think it was an expedient and a fair and proper assumption, that the English were right in that view. But whether they are right or wrong, the English un-

* The English charters of the American colonies, ranging in date from 1609 to 1732, purported to grant tracts extending across the continent to the Pacific, and in breadth from the 30th to the 48th degree, yet this did not deter the French from continuing, without protest, the settlement of the valley of the St. Lawrence, nor from taking possession of the valley of the Mississippi; nor did Great Britain, on the settlement of 1763, put forward these charters as an objection to the retention by France of the country beyond the Mississippi.

† This is a misapprehension. See *ante*, p. 260, note *; *post*, p. 253, note*.

‡ See *ante*, p 200, note*; *post*, p. 253, note*.

doubtedly first took possession of it under their discovery,* and then it is a question of law to what extent of territory that gives the English a right, internationally speaking, as between them and the French, by virtue of their prior discovery and their after occupation.† That question of law I propose to discuss still later on. As I understand the result of the authorities—speaking in that sense of the recognized rules which govern all the treaties dealing with this part of the North American continent, and I submit they must be accepted as the international law on the subject—it is this, that the discovery of a coast line, and the occupation of that coast line, give to the discoverer an entire right to all the territory that is drained there. Now, the American ministers put forward a much wider claim. They put forward this claim. They said that the discovery of the mouth of a river gave to the discoverer and occupier of that river, or of the mouth of that stream, a right to all the territory that was drained by the stream, and that is discussed in Dr. Phillimore's work, and afterwards in Sir Travers Twiss's, and settled now on this basis: that the American view put forward by Mr. Gallatin was too broad—that merely the discovery of the mouth of a river did not give a right to all the territory which it drained; but that the discovery of the coast line, and the occupation, of course, in either case, did give to that discoverer and occupier a right, internationally speaking, to all the country that was drained into the coast line.

Sir ROBERT COLLIER.—You must not assume that to be so.

The LORD CHANCELLOR.—If Sir Travers Twiss said so—it cannot be taken to be the law.

LORD ABERDARE.—You must shew that the occupation followed on the discovery.

Mr. MCCARTHY.—Of course, my Lord, that would be so.

Lord ABERDARE.—I suppose the first occupation was under the charter.

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—And the discovery was in 1610.

Mr. MCCARTHY.—Yes, that is also dealt with. If the discovery is not followed by the occupation, and anybody else intervenes, then it is also a question of whether there has been an abandonment.

Lord ABERDARE.—Yes, the French claim to have intervened.

Mr. MCCARTHY.—Yes, but as a fact they did not. There is no pretension that they had gone into Hudson's Bay until after the Hudson's Bay people had been there.‡ The Hudson's Bay people went into Hudson's Bay first in 1667.

* This was denied by the French, and on the part of Ontario. As to the early possession of the French, see *ante*, p. 200, note *; appendix B, hereto. From the time of Cabot, up to 1615, the date of Baffin's and Bylot's voyage, many English ships visited the Bay or vicinity, with various objects, chiefly in search of a north-west passage, but these voyages were followed by no sort of possession. The next voyage, after an interval of sixteen years, was that of Captain Fox, in 1631, at a time when the whole of Canada, including the Bay, was in the occupation of England by Kirk's conquest of 1629. From 1631 there was no other English visit to the Bay until 1668, when Gillam was conducted thither by the two renegrade Frenchmen, Radisson and Des Grosselliers. There was thus a complete abandonment for a period of thirty-six years, as if out of regard to the terms of the Treaty of St. Germain en Laye, 1632, when England restored Canada to France; and in the meantime the French were in possession of the country and of the Indian trade. (See the same note.) Gillam's voyage was followed by the incorporation of the Hudson's Bay Company, in 1670, and by the erection of posts at the mouths of some of the rivers on the margin of the Bay. These the French looked upon as encroachments upon their territory of Canada, and they moved against them, as soon as might be, by sea and land, and either captured or destroyed them. The French had erected posts on the self-same rivers, within-land, *antecedently in each case*, with one exception, to those of the company, and had so an actual, and not merely a constructive, prior possession. The exception was Churchill, on the river of that name, built in 1688, but captured by the French the year following. (Appendix B, hereto.)

†There was, on the part of the English, neither effectual prior discovery nor occupation. See *supra*, note*.

‡Counsel overlooks the evidence establishing the contrary state of facts. See *ante*, pp. 189, note ‡, 200, note †; *supra*, note *; appendix B, hereto.

Then they came back and got their charter. A man of the name of Zachariah Gillam was sent from Bristol on behalf of the Hudson's Bay adventurers, and took possession, and then came back and represented it to the King and got the charter.

Lord ABERDARE.—What was the earliest date of the claim of the French?

Mr. McCARTHY.—They pretend that a man of the name of Bourdon—

Lord ABERDARE.—The attorney-general?

Mr. McCARTHY.—Yes, Bourdon, the attorney-general of Canada. They pretend that he went there, and took possession in 1656.

The LORD CHANCELLOR.—I see that various forts are said to have been built in 1684.

Mr. McCARTHY.—Yes, my Lord, that we deny, and on the evidence, if it becomes necessary to go into the evidence, I shall be able to satisfy your Lordship that Bourdon did not go there. Bourdon was despatched from Quebec and directed to go there, and he is said to have gone there in 1656; but as a matter of fact it appears that he started and went a distance, but did not succeed in getting there on account of the difficulties, and then returned.* Then, in 1667 the Hudson's Bay people are there, and they continue in occupation until 1672, and in 1672 Father Albanel is sent out from Quebec, and he goes through the form of putting up a pole and putting up the French arms, and takes possession in the name of the King of France, doing it all secretly.† But in 1673, the French Governor at Quebec corresponded on friendly terms with the Governor of Hudson's Bay, and it has always been put forward as another claim that the French in the first place acquiesced in the possession of the Hudson's Bay Company.‡ But from that time to 1682 or 1683, the French were conspiring to drive out the Hudson's Bay adventurers, and in 1686 they sent out a military expedition, and did drive them out, and took possession of their forts—or six of seven forts—which they had erected. Your Lordships have heard the history of that which followed, in the subsequent treaties.

Now, the proposition of international law I will state, and I do not think anything can be found to the contrary, and I submit it is in accordance with reason and law. If this continued, how was the country settled? The English settled on the Atlantic coast; they claimed, as the map shews, that that settlement gave them a right as far as the Pacific Ocean. They claimed that Virginia stretched to the Pacific Ocean. The English claim was wider than the French, because the French claimed the watershed of the system up to the height of land.§ If your Lordships remember—and I will give the reference to it—when La Salle

* No fact of history seems better established than that of Bourdon's voyage to the Bay. It was authorized by an *arrêt* of the Sovereign Council of New France, and its fulfilment proven by entry in the Register of the Council, and testified to by Governors De Callières and De Denonville. (Joint App., 625, 628). Moreover, the same fact appears by the Transactions of the Commissioners under the Treaty of Neutrality. (Joint App., 466, 477).

† Not secretly. The Intendant Talon, reporting to the King, 2nd November, 1671, says: "Three months ago I despatched, with Father Albanel, a Jesuit, the Sieur de St. Simon, a young Canadian gentleman recently honoured by His Majesty with that title. They are to penetrate as far as Hudson's Bay. . . . As those countries have been long ago (*anciennement*) originally discovered by the French, I have commissioned the said Sieur de St. Simon to take renewed possession in His Majesty's name, with orders to set up the escutcheon of France, with which he is entrusted, and to draw up a *proces verbal* in the form I have furnished him." The *proces verbal* shews that the taking of possession was in presence and with the consent of the chiefs of the Indian nations. The instrument was witnessed by Albanel and St. Simon, and by Sebastian Provero, the notary, "and the chiefs of each Indian nation, to the number of eleven, made their hieroglyphical marks." (Joint App. 620; Ontario App. 6.)

‡ There is no evidence whatever in support of this contention. See *ante*, pp. 190, note ‡, 253, note *; appendix B, hereto.

§ The French claimed northward to the Arctic Circle, or the Polar Sea, and westward indefinitely, or to La Mer de l'Oüest, or La Mer du Sud. And, as to the English claim, see *ante*, pp. 252, note *, 253, notes * and †.

discovered the Mississippi,* he came from the north. He started from Quebec and came down by the Wisconsin, and penetrated down the Mississippi to the mouth, and it was not until he got to the mouth of the Mississippi that he claimed to be the discoverer. Then he erected a pole, and made a proclamation in the name of the King of France that the whole of the territory drained into the Mississippi was taken possession of in the name of the Crown of France. Now, everything in these matters relating to the continent was treated on that basis, and the only dispute was, as between the American minister setting up that the mere discovery of a river gave a right to the watershed of a river, and the other claim, contended for by the British minister and the Spanish minister, that that was not so unless there was a discovery of the coast line as well.

The LORD CHANCELLOR.—There seems to be about as much foundation for the one idea as for the other. If you say, that because you take possession of a few miles of the coast of Africa, you take possession of all the country which is drained by a river which goes three thousand miles, it is so absurd that I cannot conceive it to be laid down by any writer on international law. However, it has very little bearing upon this question.

Sir ROBERT COLLIER.—Whether it is so or not is of very little consequence.

The LORD PRESIDENT.—What do you conceive to be the bearing of all this?

Mr. MCCARTHY.—The bearing of all this is that the charter did give to the Hudson's Bay certain definite limits. If it did not give to Hudson's Bay certain definite limits, the charter was void for uncertainty. Now what were those limits?

Sir ROBERT COLLIER.—Then we go back to the charter.

Mr. MCCARTHY.—I am speaking about that charter, under which was the only possession that the English had in all this north country. The Hudson's Bay Company represented the Crown of England, and the charter purported to give them all the lands which drained into the Bay.† Now, either it was void for uncertainty, and a piece of waste paper—and I am not required to admit that—or it did give to the Hudson's Bay Company certain definite limits. Where are those definite limits? Can my learned friends on the other side suggest any definite limits to the Hudson's Bay grant?

Sir ROBERT COLLIER.—I thought you were trying to suggest some title that they had, independently of the charter.

Mr. MCCARTHY.—No, my Lord.

Sir ROBERT COLLIER.—Then we come back to the charter, and we have heard your views on that subject.

Lord ABERDARE.—Would you argue that although the French may have possessed themselves of the portion of the territory draining into Hudson's Bay most distant from Hudson's Bay, and held possession of it for a considerable time, that claim of the company would have availed as against England itself when it once became possessed of Canada?

Mr. MCCARTHY.—Precisely.

Lord ABERDARE.—You argue that even although the evidence shewed, for instance—just as an example—that a portion of this territory awarded by the

*The Jesuit Father Marquette, and Louis Joliet, commissioned by the Governor of Canada, were the first, and joint discoverers of the Mississippi, which they reached from Green Bay, by the Fox River and the Wisconsin, and explored from the Wisconsin to the Arkansas. This was in 1672. La Salle did not reach the river until several years later, and then by the Illinois; and he traversed it to its mouth. (Joint App., 633, 644). Nicolet, in the service of the fur-trading Company of the Hundred Associates, was in the region between Green Bay and the Mississippi as early as 1633-4, and within easy distance of the river; but it is not yet clear in evidence that he actually reached it.

†The charter contains no such words. And their Lordships had already decided that this theory put forward by counsel was not maintainable.

arbitrators within the watershed towards Hudson's Bay, had been occupied by the French, that occupation for fifty, eighty or a hundred years, would not avail against the claim of the Hudson's Bay Company?

Mr. McCarthy.—Yes, my Lord, that is my proposition.

The Lord Chancellor.—It is really a proposition which, if it is anything, is the most extraordinary imaginable. The French got access to this country, which is drained at a certain point by the St. Lawrence, they push their settlements into the interior, and do not meet there with any other settlements of any other nation whatever. According to your argument, they might organize these settlements in the most civilized way, and build towns and villages, and cultivate the land, but because King Charles II. had granted, a hundred or fifty years before, a charter to some of his subjects, which in the terms of it, as you say, construed upon certain principles, would include part of the territory which the French had so settled, therefore, internationally, the adventurers, the grantees of Charles II., have a right to turn out the French settlers?

Mr. McCarthy.—Yes.

The Lord Chancellor.—It is perfectly absurd.

Mr. McCarthy.—May I put it in this way? Assuming, for the moment, that it is part of Hudson's Bay, and supposing that the Crown of England had sent there directly, not by the Merchants Adventurers, but directly taken possession of this coast line on the Hudson's Bay?

The Lord Chancellor.—That is exactly the same thing.

Mr. McCarthy.—Then assuming that the French got into possession of the sources or the head waters of the rivers, not by their consent or acquiescence?

The Lord Chancellor.—Assume that they push their settlements back from the point at which they had *bona fide* settled.

Mr. McCarthy.—Yes, my Lord; then, I say, the French claims would not have availed. That is what has been denied in all these matters.

The Lord Chancellor.—Even though acquiesced in?

Mr. McCarthy.—Of course that is a different thing. If it is acquiesced in, that would be equivalent to abandonment, and there is no pretence of any acquiescence at all.

Sir Robert Collier.—You mean by the Crown?

Mr. McCarthy.—Yes.

The Lord President.—I understand that you admit that the boundaries mentioned in the Quebec Act as the boundaries of Canada are conclusive for our purpose?

Mr. McCarthy.—Yes, my Lord.

The Lord Chancellor.—And that what we have to do is to ascertain what those boundaries mean?

Mr. McCarthy.—Yes, my Lord.

The Lord Chancellor.—You go on to say that the boundary of the Hudson's Bay is to be obtained by theory and not by fact?

Mr. McCarthy.—By both together. I am putting forward the theory first, and I come now to the fact. I say that even assuming what my friend said to be the fact—and your Lordship exaggerated the argument in order to put it to the test—there is no pretence that there was any settlement.

Lord Aberdare.—That is the question of fact?

Mr. McCarthy.—Yes, my Lord. In the way that the Lord Chancellor put it, it was put as if the French had built cities and towns.

The Lord Chancellor.—That was to try the principle.

Mr. McCarthy.—I understand that, my Lord; but all that they did was to go and take possession of forts against the will of the Hudson's Bay Company, and against the will of the Crown of England.*

Lord Aberdare.—When they first put up these forts, the Hudson's Bay people were so remote and distant from them that they could not have known what they were doing.

Mr. McCarthy.—I think they soon became alive to it.

Lord Aberdare.—They probably could have made very little progress for a long time towards the interior, and you do not suppose that in the early time when these forts were placed by the French along the immediate northern line of the height of land, the Hudson's Bay Company would have known anything about it.

Mr. McCarthy.—No. I think, my Lord, they were ephemeral. They were not put there permanently.† The first fort is spoken of in 1719.‡ That was, no doubt, immediately abandoned; it was not a permanent fort; it was not occupation by the King. The King said to certain gentlemen and adventurers—but I had better give your Lordships the evidence on that point.

Lord Aberdare.—The first French forts seem to have been built in 1684.§

Mr. McCarthy.—There is no evidence of that. The first evidence which has been cited from the Appendix—because the statements on the map were not accepted‖—the first evidence that we have of the occupation consists of the building of a fort by a man of the name of La Noüe. ¶

The Lord President.—Do I understand you to hold that the words of the charter, "Not now actually possessed by the subjects of any other Christian Prince or State," had no effect?

Mr. McCarthy.—Practically.**

The Lord President.—I mean from the state of facts existing?

Mr. McCarthy.—Yes, my Lord.

Sir Montague Smith.—If you find that there was a subsequent time, although a very distant time, when they had occupied? I do not say that the evidence proves it, but supposing they had?

The Lord President.—The words are, "not now actually possessed."

Sir Montague Smith.—But supposing you find that for a long distance of time they had it, and that they were in Canada at an early period, you would infer, in the absence of all evidence, that they were putting their forts where they had a right to put them?

Mr. McCarthy.—There is evidence that the occupation of Canada was limited to what was properly Canada, that is to say the watershed of the St. Lawrence.††

*On the contrary, the French, besides capturing the forts of the Hudson's Bay Company, had themselves erected—some before and others after that event—a number of forts beyond the height of land. See *ante*, p. 200, note*; appendix B, hereto.

†The evidence does not sustain this statement of counsel, but, on the contrary, establishes that the French remained in occupation of the forts in question until the cession of Canada, and that such occupation, if not by the King in person—as of course it could not be—was by his representatives, and by direct authority as well of the King as of the Governor of Canada.

‡The fort here referred to is doubtless that which La Noüe was commissioned to build, on Rainy Lake, in 1717, and which was rebuilt by Verendrye in 1731. But as to its being the first fort beyond the height of land, the evidence to the contrary is simply overwhelming. See *ante*, p. 200, note *; appendix B, hereto.

§The first built north of the height of land was in 1661, several others in 1673, and a number subsequently. *Ibid.*

‖The map was a reflex of, and the statements thereon in strict accordance with, the facts in evidence.

¶This is a total misapprehension of the facts. See *ante*, p. 200, note *; appendix B, hereto.

**See *ante*, p, 250, note ‡.

††See the conclusive evidence to the contrary *ante*, p. 200, note *; appendix B, hereto.

Sir MONTAGUE SMITH.—But supposing they had put their posts or forts further—beyond the watershed ?

Sir ROBERT COLLIER.—The company did not think of going to the south, to the extent to which you put their boundary; they were quite satisfied, in 1700, to take a boundary different from the boundary of the watershed. This contention, that they were entitled to all the lands of rivers flowing into Hudson's Bay, never occurred to them.

Mr. MCCARTHY.—For the purpose of my argument, the 49th parallel is as good as the height of land. I do not suppose my friend would like to accept for Ontario the 49th parallel.

LORD ABERDARE.—Because that goes through a part of admitted Ontario.

Sir ROBERT COLLIER.—They give up the watershed of this land. They did not claim that. There are a number of rivers which drain into James' Bay, which, according to their own shewing, on the system of the boundary being the watershed, they ought to have claimed.

Mr. MCCARTHY.—The only evidence that I have, and which has been referred to about the French possession is this—perhaps we had better have the facts first, and discuss the law afterwards. Your Lordships will find it at page 640 of the Joint Appendix,* and it is not unimportant to observe in reading this, that the French were not intending to take possession of this country, but were intending to find stepping-stones to get to the Western Sea.† All these they called, as your Lordships will remember, Post of the Western Sea.

LORD ABERDARE.—That would accord with the intention of keeping all the land that lay between Canada and the sea.

Mr. MCCARTHY.—No, my Lord, as I understand they had to get stepping-stones or resting places on their journey. I think that will appear. They started at Fort William, and got to another point, and so on; and not only that, but the French Government said, you must pay your expenses by the fur trade that you get in your journey. That is the way it was.

LORD ABERDARE.—When did this expenditure begin ?

Mr. MCCARTHY.—In 1717.

LORD ABERDARE.—Then that observation would not apply to forts built before 1717 ?

Mr. MCCARTHY.—There are no forts except those in the neighbourhood of Hudson's Bay, which were given up by the Treaty of Utrecht. They were given up.‡

Sir MONTAGUE SMITH.—That may be so, but then they existed. I do not see what is the effect of it.

LORD ABERDARE.—These forts given up by the Treaty of Utrecht were generally along the coast.

Mr. MCCARTHY.—There were no others. §

* Conseil de Marine, 7th December, 1717, as to M. de Vaudreuil having been authorized to establish three posts at Kaministiquoya, Rainy Lake, and Lake Winnipeg, respectively.

†That sea was the ultimate goal, and the limit they had set to their territorial dominion; but the evidence is clear that their settled possession kept pace with the actual exploration, and embraced, at the period of the capitulation, the whole Winnipeg basin, guarded by a chain of forts stretching from Rainy Lake to the source of the Saskatchewan (*ante*, pp. 94, note, 143-4, 187, notes † and ‡, *post*, p. 262, note ‡). The further and full realization of their hopes was left to their Brito-Franco-Canadian successors, who, taking up the work where the French officers had stopped, pushed the trade, and the forts, beyond the Mountains, reached the Sea, and secured that section of the Pacific slope to the British—now the heir of the French—dominion. (Joint Appendix, 177-8, 186-7 ; Ontario Appendix, 55-6).

‡ Only those on the shores of the Bay were given up. The French retained their interior posts, whether to the north of the height of land or in the North-West, until the cession of Canada, and their trading operations extended at some points even to the shores of the Bay. See appendix B, hereto.

§ There were many others. See *ante*, p. 200, note * ; and appendix B, hereto.

LORD ABERDARE.—I find on this map a fort to the north of Lake Alemepigon.

Mr. MCCARTHY.—That is south of the height of land.

LORD ABERDARE.—That is in French Canada.

Mr. MCCARTHY.—There is no fort that I can find in the evidence, and I can only speak of that; and my friends on the other side have not given any evidence of a fort until this one I am speaking of in 1717.*

Mr. SCOBLE.—I call your Lordships' attention to the foundation of Fort Lamaune, which is in this despatch of the Sieur Du L'Hut, at page 624 of the Joint Appendix.†

LORD ABERDARE.—That is the one which I was mentioning before, near Lake St. Joseph. That is the exception.

Mr. MCCARTHY.—If so, when was it erected? May I go back to see what the evidence is about it?

The LORD CHANCELLOR.—It is extremely important in connection with this present controversy, if it is the fact that there was at that time a fort on the eastern angle of Lake St. Joseph constructed by the French.

Mr. SCOBLE.—It is mentioned in the last paragraph on page 624, in the paragraph which begins, "It remains for me." He says:

"The Klistinos, the Assenepolacs," and so on, "which comprises all the nations which are to the west of the Northern Sea, have promised to be next spring at the fort which I have constructed near the River á la Maune, at the bottom of Lake Alemepigon, and next summer I will construct one in the country of the Klistinos, which will be an effectual barrier"

Mr. MCCARTHY.—The beginning of Lake Alemepigon is in Ontario, not in the disputed territory.

LORD ABERDARE.—Where is that Fort á la Maune?

Mr. SCOBLE.—Your Lordship will find it shewn on the map, near Lake St. Joseph. Your Lordship will find it at page 624 of the Joint Appendix, in the paragraph which begins, "It remains for me."

Mr. MCCARTHY.—

"The Klistinos, the Assenepolacs, the people from the Sapinière, the Openens Dachiling, the Outoubouhys and Tabitibis, which comprises all the nations which are to the west of the Northern Sea, have promised to be next spring at the fort which I have constructed near the River á la Maune, at the bottom of Lake Alemepigon, and next summer I will construct one in the country of the Klistinos, which will be an effectual barrier."

Mr. SCOBLE.—Your Lordship will find it shewn on the map, near the Lake of St. Joseph.

Mr. MCCARTHY.—This is not evidence of that: "Have promised to be, next spring, at the fort which I have constructed near the River á la Maune, at the bottom of Lake Alemepigon." Well the whole of Lake Alemepigon is south of the height of land. I object to putting anything down when there is no evidence in support of any such forts.

LORD ABERDARE.—Where is the River á la Maune?

Mr. MCCARTHY.—There is no such river. There may have been a river so called at the date. The list of forts did not include any fort north of the height of land, except the one I was about to mention.

* There was before their Lordships ample evidence to the contrary. See *ante*, p. 200, note *; appendix B, hereto.

† The Sieur Du L'Hut to Governor de la Barre, 10th September, 1684.

Sir MONTAGUE SMITH.—Where is the list of forts given?

Mr. MCCARTHY.—At page 603, Joint Appendix.* My friends talk of Fort St. Joseph,† but Fort St. Joseph is on the River St. Clair—quite a different place altogether. We can make that clear to your Lordships, although my friends deny it. That fort is on the River St. Clair, near Detroit. There is another called St. Joseph at the head of the waters of the Wabash, at a different place, but there is no Fort St. Joseph on Lake St. Joseph, nor does the place my friend refers to speak of a fort, except near the river at the bottom of Lake Alemepigon.

Lord ABERDARE.—It says it is on this River à la Maune. We have not been supplied with any evidence that this fort, near Lake St. Joseph, really existed.

Mr. MCCARTHY.—No, my Lord, except the statement that it is at the bottom of this Lake Alemepigon. I perfectly understand that they had forts there, and I do not attempt to investigate it, because I am confining my attention to forts within the height of land, and not outside the height of land.

The LORD CHANCELLOR.—And you say that of these forts marked 1684 on the map, there is no evidence.

Mr. MCCARTHY.—Oh, yes, my Lord, you will find on their map, they have marked these on the south of Lake Nepigon. They have Fort Alemepigon, built at that very time, put on their own map, between Lake Alemepigon and Lake Superior.

Mr. MOWAT.—But there is Fort Lamaune.

Mr. MCCARTHY.—Where is that?

Mr. MOWAT.—On Lake St. Joseph—the supposed site, as indicated on the map.

Mr. MCCARTHY.—So you say, but where is the evidence of it?

Lord ABERDARE.—Where is the evidence of it, other than what is written on that map?

Mr. MOWAT.—There is the Sieur Du L'Hut's despatch; as to anything further, I will have it looked up.

Mr. MCCARTHY.—Our attention was not drawn to it in my learned friend's opening, nor was there anything to indicate that; and it is very important that we should know about it, if there is any evidence of it.

The LORD CHANCELLOR.—Very well, then, you say we are to discharge from our mind everything relating to that.

Mr. MCCARTHY.—Yes, my Lord. We rely on the evidence here in the Joint Appendix, which we have agreed to be evidence for what it is worth.

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* The list here referred to is Governor Pownall's, of 1756, and is only a partial list, and very incomplete.

† No such reference had been made to Fort St. Joseph. The one referred to in the list is that on the river of the same name, which falls into Lake Michigan (south-easterly shore). This fort, and Fort St. Joseph on the St. Claire, are set down on the Ontario map. The same map has the inscription at the foot of Lake St. Joseph, near the River Savanne: "Supposed site of Fort Lamaune, built by Du L'Hut, before 1684." In preparing the draft of the map, this site was selected as the one, under all the circumstances, best answering the description, but the element of uncertainty was indicated by the words "Supposed site." The object Du L'Hut had in view—to prevent the upland savages from descending to Hudson's Bay; the absence on all the maps, ancient and modern, of any river so named falling into Lake Nepigon, whose geography was perfectly well known to the French from a period long anterior to 1684; the fact that Lake Nepigon was the channel through which the French reached their most northerly posts, and that the Savanne might not inaptly be referred to as at the foot, the French expression here rendered "at the bottom of" not necessarily meaning any point on the shore, but rather a locality at or beyond the sources of; the actual existence, at this period, of two other forts—one at the head of the lake, Fort Latourette, and the other, Fort Nepigon, at the mouth of the River Nepigon—with neither of which can Fort Lamaune be identified; the similarity of the names Lamaune and Savanne, the change in spelling of which may have been due to error in print or transcription; and the fact also that not the fort but the river was stated to be at the foot of Lake Alemepigon—were circumstances (amongst others) which pointed to the site chosen as the approximately correct one.

Then there is evidence at page 640, and it is with regard to the planting of posts.

The LORD CHANCELLOR.—It is rather to be regretted that this map should be in our hands all this time if it is not to be trusted.* Who puts it in?

Mr. MCCARTHY.—Ontario puts it in. It has been engraved specially for this hearing.

Sir MONTAGUE SMITH.—I understood that you agreed that it might be used, subject to proof of disputed facts.

Mr. MCCARTHY.—Subject to not relying on those dates, unless proved from the general Appendix. I admit that the coast line, and the general configuration of the country, are correctly laid down.

Sir MONTAGUE SMITH.—But you say the statements upon it are disputable.

Mr. MCCARTHY.—Oh, yes. They have to be proved from the Joint Appendix. That map has been prepared within the last week, and we did not see it even, until the first day of the hearing; and then, in order to prevent confusion, we put lines upon it so as to enable your Lordships to understand our arguments, and have used it in that sense throughout.

You will find, at page 640,† directions were given by the French Government with regard to the planting of posts:

"Messrs de Vaudreuil and Begon‡ having written last year that the discovery of the Western Sea would be advantageous to the colony, it was approved that to reach it, M. de Vaudreuil"—I do not know whether that is the governor or some officer—"should establish three posts, which he had proposed, and he was instructed, at the same time, to have the same established without any expense accruing to the King, as the person establishing them would be remunerated by trade, and to send a detailed schedule of the cost of continuing the discovery. In reply, it is stated that M. de Vaudreuil, in the month of July last, caused the Sieur de la Noüe, lieutenant, to set out with eight cannon to carry out this scheme of discovery. He gave him instructions to establish the first post at the River Kamanistiquoya"—that is Fort William to the north of Lake Superior—"after which he is to go to,"—another lake with an Indian name,§ which I take it was either the Lake of the Woods, or one of the Winnipegs—Winnipeg was at that time thought to be two lakes—"near the lake of the Christineaux, to establish a second, and to acquire, through the Indians, the information necessary for the establishment of the third at the Lake of the Assenipoëlles.‖ This journey costs the King nothing, because those engaged in it will be remunerated for their outlay by the trade which they will engage in; but to follow up the discovery, it is absolutely necessary that His Majesty should bear the expense, because the persons employed in it will have to give up all idea of trade."

Then there is the estimate of the cost of following up the establishment of these three posts. Then you will find, on the following page, 641, a letter dated from Quebec, December 11th, 1718,¶ which is a report as to these posts:

"Le Sieur de Vaudreuil has been informed by the letters of Sieur de la Noüe, that having arrived very late at Kaministiquoya, where he found but few Indians, he was unable to send any of the canoes to Kamanionen [Kamamioüen], and that he will send them after the return of those which he sent this spring to Michilimakinac, in search of provisions; he

* The map was perfectly trustworthy, and in actual accord with the evidence. On the point under discussion, the map fairly drew attention to the element of uncertainty respecting the location of Fort Lamaune: it says "Supposed site," etc. See *ante*, p. 260, note †.

† The document is dated, Conseil de Marine, 7 Décembre, 1717.

‡ The Governor and Intendant, respectively, of Canada.

§ "Takamanigen"—Takamamioüen—Rainy Lake.

‖ Winnipeg.

¶ The Intendant Begon to the French Minister.

adds that the Indians of his post were well satisfied with this establishment, and promised to bring there all those who have been accustomed to trade at Hudson's Bay; that he wrote through a Frenchman who was at Point Chagouamigon, to a chief of the Scioux nation, and he hopes to succeed in making peace between this nation and that of the Christineaux; the accomplishment of which would put him in a condition to pursue with less risk the execution of his orders for the discovery of the Western Ocean."

Then the next letter* is also bearing upon the same subject. It states that no letter had been received from these gentlemen, and at page 642 it is continued; and there, I think the account of that expedition ends.

Well, now, there is not a word that that fort was kept up or maintained.† We have not a word about that fort again until we come to the history of the forts given at page 643. Mr. Bellin seems to have pursued the same ground, and re-established the posts which had been put here in 1717, an attempt to discover the Western Sea which was practically abandoned.‡ Then we will come to see what these gentlemen did.

Then we come to Colonel de Bougainville's account, in 1757,§ upon which so much reliance was placed by my learned friends; and while I do not in one sense dispute the general statements made by this officer, I am not at all prepared to accede to the proposition that they are to be taken with literal exactness, because it was written after the war, after the cession, and purported to be a statement of the French occupation of the French forts during the cession, or prior to the cession; but he speaks of them as "the Post of the Western Sea." He says:

"The Post of the Western Sea is the most advanced towards the north. It is situated amidst many Indian tribes with whom we trade, and who have intercourse also with the English, towards Hudson's Bay. We have there seven forts, built of stockades, trusted generally to the care of one or two officers, seven or eight soldiers, and eighty *engagés Canadiens*. We can push further the discoveries we have made in that country, and communicate even with California."

The language here is extraordinary, to say the least of it. It is written after the cession.

Mr. MOWAT.—In 1757.

Mr. MCCARTHY.—It is an account of 1757, but it was not written in 1757, as I understand.

Lord ABERDARE.—Yes, it was published in 1757.

Mr. MCCARTHY.—Your Lordship will find, at page 25 of the Ontario Appendix it was published in 1867.

Mr. MOWAT.—No. That is a French book giving an account of these things, and published in that year.

*MM. de Vaudreuil and Begon to the Conseil de Marine, dated Quebec, 14th October, 1719.

†It appears from Verendrye's narrative that this fort on Rainy Lake was re-established by him in 1731 as Fort St. Pierre (Ont. App., p. 16). It was thereafter continuously maintained during the period of the French occupation. (Bougainville, 1757, *ante*, p. 94, note; Jefferys, 1761, *ante*, pp. 143-4).

‡N. Bellin, who was a geographer, and "Ingenieur de la Marine"—that is, of the Department of Marine and the Colonies—had personally nothing to do with the establishment of these posts, but, in his "Remarques sur la Carte de l'Amerique Septentrionale," published in 1755, makes reference to them, and to "the memoirs of MM. de la Veranderie, father and son, sent to establish various forts for the protection of the newly discovered territory, and the journal of M. Le Gardeur de St. Pierre, an officer of the troops in Canada, who visited the forts in 1750, with instructions to extend his discoveries to the utmost practicable extent, make treaties, and establish trading relations with the most distant Indian nations." (Joint App. 643). St. Pierre's party reached the Rocky Mountains, where they established Fort La Jonquière, in 1752. In 1753, he was replaced in the command of the Posts of the West by M. de la Corne. (Ontario App. 22). The statement that there was any abandonment, is wholly at variance with the evidence.

§ Printed *ante*, p. 94, note.

Lord ABERDARE.—It does not say it was published then, it says it was given in this particular book.

Mr. MCCARTHY.—We will see how that is.*

Lord ABERDARE.—These posts seem to have been established for other than mere purposes of geographical discovery. They seem to have been established for trading purposes.

Mr. MCCARTHY.—They had licenses—not to take the territory, but to trade with the Indians. The governors of the forts had power to give licenses† to people who chose to trade with the Indians, for which certain royalties were exacted, and it was upon these licenses that some of these matters took place—not licenses to discover and take possession, but licenses to trade with the Indians. What they were doing was attempting to tap the Hudson's Bay trade, by getting at the Indians at the sources of the rivers, instead of letting them come down to Hudson's Bay. But I think I can point that out more fully in the Ontario Appendix. Your Lordship will find this set out at pages 25 to 30, and the note is :

"Memoir on the State of New France at the time of the Seven Years' War (1757). Louis Antoine de Bougainville, author of this Memoir on Canada, was one of the most distinguished French officers in the war which resulted in the conquest of Canada. His *mémoire* was submitted to General de Montcalm at the time it was written, and that officer testified to the correctness of the information it contained. . . The French original is given in *Relations et Memoires Inedits, etc., par Pierre Margry*, Paris, 1867."

So that your Lordships see they are first published in Paris, in 1867, and they consist of the statement given by this gentleman after the war was over.‡

I will follow now, with your Lordships' permission, the statement in the Ontario Appendix, page 27, because it is stated to be given more fully than the other; and the statement with regard to the Western Posts is treated of. Now, it is important to observe that what this gentleman is speaking of was the expedition of Verendrye.

Lord ABERDARE.—This must have been written about the year 1757, because it was submitted to General de Montcalm, who was killed in 1759.

Mr. MCCARTHY.—Yes, if that is true, that must be so.

If your Lordship will look at the list of forts given, commencing at page 28, that have any bearing upon this question,§ the first is Kamanistigoya, which is Fort William. That was farmed out to a French gentleman. Then comes

* The work was prepared as in the nature of a report, in 1757, and remained in the French archives of the Department of Marine and the Colonies until 1867, when Mr. Margry, the keeper of those archives, published the French original, from which this translation has been made.

† This power was really in the Governor-General : "We call *congés* the licenses or permits that are granted by the Governor-General," etc. (De Bougainville, Ont. App., 29.) "No Canadian is suffered to trade with the Indians but by license from the Government, and under such regulations as that license ordains. The main police of which is this : the Government divides the Indian countries into so many hunts, according as they are divided by the Indians themselves. To these several hunts there are licenses respectively adapted, with regulations respecting the spirit of the nation whose hunt it is ; respecting the commerce and interest of that nation ; respecting the nature of that hunt." (Governor Pownall, Joint App., 601-2.) "Under these regulations the canoes went first to the post of the district, from whence they had full liberty to go among the Indians, and accompany them to their hunting grounds ; they likewise called on their return. If any were ill-treated, they complained to the Commandant, who assembled the Chiefs and procured redress ; the Savages also made their complaints, and obtained immediate satisfaction—an exact report of all which was sent to the Governor." (Governor-General Carleton to the Earl of Shelburne, respecting the French posts, 2nd March, 1768, Joint App., 609.)

‡ Not after the war was over. See *supra*, note * ; and pp. 95, 97 *ante*.

§ The list (see extracts *ante*, pp. 94-5 note) commences, not at page 28, but at p. 27 of the Ontario Appendix. On this page are mentioned the forts of the North-West, from Rainy Lake to the Saskatchewan, inclusive, viz., St. Pierre, St. Charles, Bourbon, La Reine, Dauphin, Poskoia and Des Prairies ; and further on are mentioned Nepigon and Temiscamingue, whose respective dependencies reached to Hudson's Bay, and Abbitibi, situate north of the height of land. These certainly have a bearing upon the subject.

Michipicoten, which is on the other side of Lake Superior. Then Sault Ste. Marie, which is on the other side also; and Temiscamingue.

Lord ABERDARE.—Kamanistigoya is within this territory, on the south side of the height of land.

Mr. MCCARTHY.—Yes, my Lord. Then he says:

"There are posts where the fur trade goes on for the benefit of the King, such as Toronto, Frontenac, Niagara, Petit Portage, Presqu'Isle, Rivière au Boeuf, Fort Machault, Fort DuQuesne. The traffic in these Forts is not a profitable one for the King."

And then it speaks of the trading posts. If your Lordships desire to have a more detailed account of how these posts were established, and why, I will give you the reference. I do not know whether you have heard that read.

Lord ABERDARE.—I think we have.

Mr. MCCARTHY.—Then, beyond a general statement, I will not trou ble your Lordships by reading it. On page 11 of the Ontario Appendix, you will find the "Explorations and Discoveries of the Verendryes, 1728-1750." I think I am not incorrect in saying that purports to be this, and nothing more: that he was directed to find the Western Sea at his own expense; and that he went, and did establish what he called forts in these different places; that he went as far as the Rocky Mountains; that he then returned to Quebec without having got as far as the Pacific Ocean; there being no pretence that these forts were kept up in any sense.* He returned to Quebec, and again, he was sent out later, and then the war broke out and it really came to nothing. It goes over several pages. I have summarized what I think your Lordships will find (if it becomes necessary to read them) is the result of all that statement, and I think I have fairly stated it.

Now, we have Lord Dorchester's statement upon this subject, which was referred to by the other side, and we will see how that agrees. It commences at page 609.

Lord ABERDARE.—That is Carleton's official report.

Mr. MCCARTHY.—Yes, in 1768. He is speaking, of course, of the past. The French had then gone, and he is speaking of the method of the French in dealing with the Indians. There is no doubt the French had been able to obtain the sympathies of the Indians better than the English had, and Governor Carleton (Lord Dorchester, as he afterwards became) is drawing attention to that in this statement. The part I allude to is his statement, at page 611, of these Forts of the West. At line 40, he tells us about these forts. Your Lordship will recollect what he says about them is this:

"The annexed return of the French posts, of the troops for the protection of trade, with the number of canoes sent up, in the year 1754, shews in some measure the extent of their trade, and the system pursued by the French Government in Indian affairs."

When you come to Gamanastigouia and Michipicoten, there is one commandant and five canoes. These forts to the west, and all these different posts mentioned, going on to Lake Winnipeg, and even beyond that—I think, if I remember rightly, the farthest post was Fort des Prairies—these posts were said to have, officers one, sergeants two, soldiers four, canoes nine. Is not it manifestly absurd to speak of these as forts, in that sense?† Then I need not refer again to what I called

* These forts were maintained until the cession of Canada. Bougainville mentions them in 1757, and Jefferys in 1761 (Ont. App., 27-29, 35); and see *ante*, p. 187, notes † and ‡. Verendrye's work in the North-West was continued by his successors in the command. (See *ante*, p. 262, note ‡.)

†As to this misapprehension of counsel, see *ante*, pp. 187, notes † and ‡, 237, note *. Governor Carleton, who wrote in 1768, and after the period of the French occupation, of events of 1754, does not give a full view of the case.

attention to this morning, that the Hudson's Bay people complained of this,* and the position taken by the British Government (and it seems to me to be a proper position), was, that it was an unfriendly act, which could not be justified, for the French to be going into the Territory of the English, during a time of peace,† building what they called forts, and interfering with the trade which rightly belonged to Hudson's Bay. I think Governor Pownall's report was also referred to, and its only importance, as I take it, (and it is important in that view), is that it establishes that these were not expeditions in the view of discovering and taking possession of, and appropriating to the French Crown, but they were licenses which were issued, and indeed, there is good reason to suppose (if I take Mr. Parkman's history, and he is the best historian of the period) that many of these expeditions were undertaken without any authority at all, but contrary to express edicts issued from time to time by the French.‡ The wood rangers infested the whole country, and the complaint at that time was, that the young men of Canada were leaving their proper employment, and becoming a species of outlaw, and disobeying the edict of their King, and interfering with the legitimate trade, which otherwise would have come to the cities of Montreal and Quebec.

Now, that is all there is of this so-called French occupation. There was no setttlement. The most that can be said about it is, that gentlemen commissioned by the King for a different purpose,§ crossed over to the territory of Hudson's Bay, and from time to time erected what they were pleased to call forts or posts, abandoned, so far as the statements shew, immediately afterwards, given up and not prosecuted in any sense as being a possession of the country adverse or hostile to the rightful owners, assuming the Hudson's Bay Company were the rightful owners of the territory at that date. But whether that be so or not what forts here would justify this award? There being none at Lake St. Joseph, as I think I may say after the statements we have heard here, there being one at Fort William, within the line—what particular fort, or post, or possession, or occupation would have entitled the French to say that that particular tract of

* There is not a tittle of evidence to shew that the Hudson's Bay Company, or the British Government, ever complained of the establishment of the French posts of the North-West.

†This position of the British Government had reference, not to the North-West, but solely to what they claimed to be territories of the Iroquois, south of the Lakes. See *ante*, pp. 230, note †, 232, note ‡, 233, note †.

‡This cannot be said of any of the expeditions which resulted in the establishment of forts or posts. They were in every case sanctioned (and usually initiated) by the authorities, and the leaders were generally military officers. Those whom the Government sought to restrain, and against whom orders and edicts were from time to time issued, were those *coureurs des bois* who went into the remote districts, without the licenses prescribed by the ordinances, to poach upon the limits of the duly authorized traders, or upon the Royal domain. These were always treated as robbers, and, when captured, severely dealt with. They were not infrequently in league with the Dutch or English traders of Orange (Albany), and turned over to them the furs which they dared not to bring to any French post.

§ On the contrary, the evidence, which counsel has evidently overlooked, shewed that the officers who established these posts and forts were commissioned for that very purpose (among others), and not for any different purpose, and that the territory was considered, and treated, and named, as territory of the French Crown, and not of the Hudson's Bay Company. Taking the North-West as an instance: La Noue, La Verendrye, Le Gardeur de St. Pierre, and Saint Luc de la Corne—all of whom held, or had held, commands in the army—were successively appointed by the Government to the position of Commandant of the Post of the Western Sea (*La Mer de l'Ouest*), as the Forts of the North-West, with the dependent territories, were collectively called, and erected there the various establishments of which we have the history, extending from Rainy Lake to the sources of the Saskatchewan. And as to the French posts to the northward of the height of land, on or towards Hudson's Bay, their founders—viz., the Company of New France ("La Compagnie de la Nouvelle France dite Canada"), the Sieur Du L'Hut, the Chevalier de Troyes, the Sieur d'Iberville, the Sieur Simblin, etc.—all acted under express authority of the Government.

On the contrary, the French retained their posts of the North-West, and many of those lying north of the height of land (as St. Germain, Abbitibi, Mistassin, etc.) or whose dependencies lay north of the height of land (as Kamanistiquia, Nepigon, Temiscamingue, etc.,) until the cession of Canada. (See *ante*, pp. 187, notes † and ‡, 237, note *, appendix B hereto).

land belonged and pertained to the colony or province of Canada, and belonged to it as against the Crown of England ?*

The LORD CHANCELLOR.—There is a fort here which seems to me to be within the disputed territory.

Mr. MCCARTHY.—That was on the Rainy Lake, I believe.

The LORD CHANCELLOR.—Yes.

Mr. MCCARTHY.—There is no line taken at Rainy Lake in that sense.†

Lord ABERDARE.—One point which seems to me of weight is, that apart from Indian names, nearly all of the names of these places are French.

Mr. MCCARTHY.—Where does your Lordship mean ?

Lord ABERDARE.—Everywhere.

Mr. MCCARTHY.—I do not understand that that is so. They named their own forts.

Lord ABERDARE.— For instance, Portage des Rats, River St. Pierre, Fort Rouge. You see, they either take the Indian name, or the French, which subsequently were altered to English.

Mr. MCCARTHY.—The French, on their maps, call them by French names, but the English never adopted them.

Sir ROBERT COLLIER.—On this map they are called by French names, just as the forts are called by French names.

Mr. MCCARTHY.—I daresay this is a correct transcript from French maps, but they are not so denominated by any English maps of the period. I will put them in. I do not understand they are so called on the English maps, even at the earliest period we have relating to the country.‡

The LORD CHANCELLOR.—What is the earliest map we have ?

Mr. MCCARTHY.—Mitchell's map of 1755: I mean of the English maps. There are some French maps of an earlier date. I do not think Mitchell's map goes practically farther than Lake Superior. It has the Christineaux on it.

Lord ABERDARE.—The Lake of the Woods is a translation of the French Lac des Bois, and Lac Seul must have been the name before it was called Lonely Lake. These names all appear to have been French, and then translated by the English.

Mr. MCCARTHY.—Or else they were English, and translated by the French.§

Lord ABERDARE.—It appears to me to be otherwise.

Mr. MCCARTHY.—I do not remember for the moment how that is. I dare say I shall be able to find the data before the argument is closed. My learned friend has just reminded me of a fact which must not be lost sight of—that the North-West Company's people who traded from the time of the cession were all French‖ from Montreal, and many of the names may have been given at that time. We shall have to look at the map to see if anything turns upon that.

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* See *ante*, pp. 187, notes † and ‡, 200, note *, 250, note ‡, 253, note * ; appendix B, hereto.

† Fort St. Pierre, on Rainy Lake, established by La Verendrye in 1731. La Noüe had established a post—Takamamioüen— there about 1717.

‡In the North-West, the names were, up to the period of the Cession, either French or Indian. In none of the numerous maps or books used or consulted in the preparation of the case for the Arbitrators and for the Privy Council did any English names appear, other than—in some few instances—as the equivalents of the French originals ; and this for the sufficient reasons that no Englishman had ever set foot in the territory up to the time of the cession of Canada, that the English geographers were of necessity dependent upon the French maps and memoirs, and that the Hudson's Bay Company's first entrance into it was as late as 1774. This was to the north of the Saskatchewan, and they did not reach the Assiniboine and the Red River before 1796 and 1799. (See appendix B, hereto).

§ The evidence to the contrary was quite clear, and must have been overlooked by counsel ; and see preceding note.

‖ The *engages* were largely French-Canadian, but the partners, factors and agents were largely British, or British Canadian, and ultimately, when in 1821 the license of exclusive trade was granted to the Hudson's Bay Company and the North-West Company jointly, the latter was represented by Messrs. McGillivray, Fraser and Ellice.

Now are the Hudson's Bay Company to be deprived of their land, or is the English Crown to be deprived of it, by this occupation? It may be looked upon, I suppose, as the English Crown more than the Hudson's Bay Company. Can it be asserted, as a proposition of international law, that if the question had then been referred to a judicial tribunal, as between the French and the English, anything your Lordships have heard here would have deprived the English Crown of its property in that country? Because that is really what my learned friends have to contend.

Now, my Lord, I come to the maps, which I may just as well refer to now. And the first observation I make with regard to them is this. I am going to refer to the maps put in by the other side, and also to deal with those we put in, bearing upon this question. It was stated (and I ask your Lordships to adopt it as my argument if I cannot read it) by those who have been concerned in investigations of this kind, that there is nothing more deceptive than a map. Nothing has given rise to greater trouble in the settlement of international boundaries than reliance being placed upon maps. Of course it is a different thing if a map is referred to in a treaty, and incorporated in a treaty, or Act of Parliament, or any document of that kind, but maps published independently, or under Royal authority, as many of these are said to be, are apt to be, and have been proved by experience to be, the most deceptive possible kind of evidence to be guided by; so that whilst I put in maps which may or may not be useful, I disclaim relying very much upon them, and at the same time I argue before your Lordships that very little reliance is to be placed upon maps put in by either side.* If your Lordships will first look at the maps they put in, one thing at all events can be derived from it. Your Lordships will find that the French write Louisiana (which is admitted afterwards to be confined to the Mississippi) right across the whole map, from west to east.†

The Lord Chancellor.—Which maps are you referring to now?

Mr. McCarthy.—These which are done up in brown [*referring to the collection of maps bound up in brown folio cover, put in by Ontario*].

Sir Robert Collier.—Is that before us?

Mr. McCarthy.—Yes, it was put in. It is not before you, but it has been put in by the Ontario side.

The Lord Chancellor.—The map of 1703 being one?

Mr. McCarthy.—Yes, my Lord, the map numbered 33 in the corner. The first thing I say about that is, that it is strongly in favour of the contention as to the 49th line. That is the only observation I have to make upon that map.‡ The other maps, so far as the Hudson's Bay is concerned, are principally important as shewing these places had English names, as Fort Rupert, Rupert Bay, New South Wales, and so on. Will your Lordship look at the map No. 71?§

The Lord Chancellor.—Is the date of the map 1744?

Mr. McCarthy.—Yes. Your Lordship will see there Louisiana is placed as crossing the Mississippi, just as in other maps referred to Canada is placed by them as stretching across the northern part of the continent.

*Ontario put in before the Arbitrators, and before the Privy Council, a multitude of Maps—or Notes of the particulars shewn by them—ranging from 1632 to 1815, as shewing (1) an almost universal consensus of authority as to the extension of Canada northward and westward, indefinitely; and (2) the wide diffusion of the French forts and posts, and the time of their establishment. This evidence was fortified by the works of reputable writers and historians, and by official documents.

†Confined to the Mississippi after, and only as a result of, the Treaty of 1763. See *ante*, p. 142, note ‡.

‡The map referred to is De l'Isle's map of 1703, hereinbefore already referred to, pp. 113, 114, 117, p. 114, note. It has on it the MS. line, put there in 1719, "Ligne selon la prétension des Anglois," along the 49th parallel, but no particular that can be said to favour counsel's contention.

§Bellin's *Carte de la Louisiane*, published 1744, and numbered 71 in the Notes on Maps.

Lord ABERDARE.—If that was not French, what was it? The French did claim Louisiana on that side of the river. What was it, if not French?

Mr. MCCARTHY.—The English called it Virginia, Carolina, and so on, as the other maps will shew—going right through and ignoring the French.*

Lord ABERDARE.—That was an extravagant claim, in the same way as the French claim to what was east of English boundaries, as Louisiana.

Mr. MCCARTHY.—The maps are not to be relied upon at all. You cannot take a map and say, because Canada is written across the head of it, that that was substantially claimed as French territory, any more than you can take it that because the English wrote Virginia from the Atlantic to the Pacific, that was English territory, though I think the English did insist that was the proper measure of their title.* Then the last map, No. 76, is important as shewing the height of land.†

The LORD CHANCELLOR.—This is 1746?

Mr. MCCARTHY.—Yes, my Lord. If your Lordship will look at the longitudinal line 45, you will see the commencement of what is marked as the height of land, shewing that even in that early time the French geographers at all events pretended to mark out the limits of the height of land.

Lord ABERDARE.—Is that map No. 76?

Mr. MCCARTHY.—Yes. You will find what I have said near meridian line 45. You will see a thin dotted line indicating the height of land. It is up at the north part of the map, very near the longitudinal line 45. Your Lordship will see it just above the lake.

The LORD CHANCELLOR.—Which lake?

Mr. MCCARTHY.—A lake I cannot make out the name of. Near line 45, your Lordship will see the commencement of a thin dotted line, which I take it is the height of land. It is marked so, I think, my Lord. I mean at the very top of the map.

The LORD CHANCELLOR—Yes, I see it.‡

Mr. MCCARTHY.—That seems to run, if my sight serves me, as far as the south of Hudson's Bay.

Lord ABERDARE.—That is pretty near what you have been speaking of, and this is the great lake we heard of.

Mr. MCCARTHY.—Then there is another line to the west. I am not sure whether that is intended for a river or a height of land. It is not very easy to tell. I do not know whether there is a river there. It is a line north of what is known now as the Lake of the Woods latitudinal line.

Lord ABERDARE.—That is a river.

Mr. MCCARTHY.—It may be a river.

Lord ABERDARE.—It is not marked as the other is.

Mr. MCCARTHY.—No, it is not marked as the other is.§

Sir MONTAGUE SMITH.—It is difficult to follow.

Mr. MCCARTHY.—It is very difficult to follow without a magnifying glass. I think it empties itself into Hudson's Bay.

The Jesuits seem to have made very good maps. We have very large maps made by the Jesuits, and afterwards copied, and now in the Library of Parlia-

*It was a case of the French ignoring the extravagant extension of limits under the English charters. See *ante*, p. 252, note *.

† D'Anville's *Amerique Septentrionale*, published 1746.

‡ The dotted line referred to is meant to indicate a portion of a height of land to the north-eastward of Lake Mistassin, and is marked *Hauteur des terres*.

§ The map shews the line in question as a series of water communications stretching westward from the mouth of the Kamanistigoyau on Lake Superior, and passing somewhat to the northward of Lac des Bois.

ment, at Ottawa, which have been sent over here for the purposes of this case, which are apparently marvellously correct. Then I refer to Mr. Bowen's map of 1772.*

The LORD CHANCELLOR.—That is not one of the set.

Mr. MCCARTHY.—No, that is not one of the set. We have got the original, but we have also got copies of it, here. This, your Lordship will see, marks the southern boundaries of Hudson's Bay as bounded by the 49th line.* Perhaps your Lordship will look at the centre portion, which is enlarged—that is very small. It is a map made by Mr. Bowen.*

Lord ABERDARE.—It is after 1763.

Mr. MCCARTHY.—Yes, because it has the original Province of Quebec marked upon it. I can give your Lordship the exact date. We agree upon it.

Sir ROBERT COLLIER—Hudson's Bay territory goes to the north of the Lake of the Woods.

Mr. MCCARTHY.—Yes; that is the 49th parallel.* This is quite correct. There was a mistake made on this map of Mitchell's, which has led to error in all the treaties made on the continent. It appears from the thorough investigation this case has had it was a mistake. I have a dozen maps here in which it was made.† One bit of this map is in the British Museum, I think.

Sir ROBERT COLLIER.—Is it another map?

Mr. MCCARTHY.—No, it is the same, only it is the centre of it. The centre of it is photographed to make it larger and plainer.

Lord ABERDARE.—What is this map you are putting in?

Mr. MCCARTHY.—Mr. Bowen's map.

Lord ABERDARE.—What do you rely on it for?

Mr. MCCARTHY.—The original speaks for itself; I see it is dated 1763.

Lord ABERDARE.—It is after the cession.

Mr. MCCARTHY.—Yes, it is after the cession. This says:

"An accurate map of North America describing and distinguishing the British and Spanish Dominions on this great Continent, according to the definitive treaty concluded at Paris, 10th February, 1763"‡

The LORD CHANCELLOR.—Was this the original Province of Quebec?

Mr. MCCARTHY.—Yes; that was the original Province of Quebec, by proclamation. The King proclaimed that into a province. It defines the lines of the original Province of Quebec. Then your Lordship sees that it gives the southern bounds of the Hudson's Bay territory, marked and defined by the Treaty of Utrecht.§ And that it is stated in the Notes on Maps to be published as late as 1775-6, or somewhere about that.

* In the work "Complete System of Geography . . . illustrated with seventy maps, by Emanuel Bowen, Geographer to His Majesty . . . London, 1747," are three maps, each by Bowen, which deal with this question of the northerly limits of Canada. They are, "Map of the Known World," in which Canada has no bounds assigned to it on the north; "A New General Map of America," wherein Canada or New France has no limit on the north; and "A New and accurate Map of Louisiana, with part of Canada and Florida," in which Canada extends to the northerly limit of the map, which is north of the height of land. (Notes on Maps, Nos. 77, 78, 79, Ontario App., 109.) The later map of Bowen, or rather Bowen and Gibson, put forward by counsel, and referred to *infra*, note ‡, can scarcely, then, in face of these facts, be looked upon as of much authority in aid of the 49th degree theory.

† The error referred to by counsel is the shewing, on Mitchell's and various other maps, the St. Lawrence River as having its source in the Lake of the Woods, which it drains into Lake Superior. See *ante*, p. 107, note. The thorough investigation referred to was by Ontario, on the occasion of preparing the evidence for the Arbitration. (Book of Arbitration Documents, 1878, pp. 136*t*, 136*u*.)

‡ This is No. 148 in the Notes on Maps. It is published by Sayer in 1775, and has on it a line, partly along the 49th parallel, marked "The southern boundary of the Hudson's Bay Company's territories settled by commissioners after the Treaty of Utrecht." This statement is erroneous, no such boundary having ever been settled. (See *ante*, pp. 142, note ‡, 222, note †.) The line of the Upper Mississippi, as far as Red Lake is shewn as the south-western boundary of Canada—north of Red Lake no western limit is assigned to that country.

§ The map in this respect was wholly erroneous. No bounds were marked or defined by, or pursuant to, the Treaty of Utrecht.

The LORD CHANCELLOR.—Where does it carry the dividing line—as far as the map goes?

Mr. MCCARTHY.—As far as the map itself extends, that is, as far as the meridian line 85°.

The LORD CHANCELLOR.—To two small points on the other part of the Lake of the Woods.

Mr. MCCARTHY.—I should think in that respect it is not quite accurate. The 49th line goes to the south of the Lake of the Woods.

The LORD CHANCELLOR.—Yes, I should think so, nearly the whole of the Lake of the Woods would be above the 49th line.

Mr. MCCARTHY.—Yes, but it is much more accurate than Mitchell's map, in 1755, which gives the Lake of the Woods hundreds of miles out of its place. Then Bell's map is the next map. That is 1772;* and the difference between that and the last map is that the height of land of the Hudson's Bay Company is given. It gives a wavy line here, in that respect according with Mitchell's map, that the true boundary was the height of land; but both these mappers, so far, either place the line at the height of land or at 49°.

Lord ABERDARE.—No, it is north of Lake Nepigon.

Mr. MCCARTHY.—Yes, that is right; the height of land is north of the Lake Nepigon.

Lord ABERDARE.—Yes, but it does not come down. It rather passes to the north of the Lake of the Woods.

Mr. MCCARTHY.—That is the way they assumed it to go: it was pretty much a straight line. I will shew when I come to the treaties, that that was the cause of the mistake between Great Britain and the United States, in taking this Pigeon River as the point of departure for the boundary line. It was on the assumption that all these lakes, as well as the Lake of the Woods,† drained into the St. Lawrence system. But as a matter of fact they do not.

The LORD PRESIDENT.—I see by the petition of the Hudson's Bay Company, in 1819, page 413, that they even thought that Fort William was not in Upper Canada.

Mr. MCCARTHY.—That was also said by Lord Selkirk, in his petition. It was not, according to the due north line; and it could not be according to the due north line. The due north line had been established as the governing point, and Lord Selkirk said, according to the decision of the Quebec court, you are trying in Sandwich as for an offence committed at Fort William, which is really outside your jurisdiction.

The LORD PRESIDENT.—

"That your memorialist futher submits that Fort William, a trading post occupied by the said North-West Company, and the place where the alleged offences charged against him are stated to have been committed, is not situated within the jurisdiction ot the courts of Upper Canada, as settled by the Act of 14 George III., cap. 83."

Mr. MCCARTHY.—And it is so defined by the decision in De Reinhard's case.

Lord ABERDARE.—This map shews the course of the Mississippi more to the westward than it really was.

Mr. MCCARTHY.—Yes, Mitchell's map also does the same thing; the Mississippi according to it, is supposed to rise between 105 and 106 degrees west.

* No. 138 in Notes on Maps, Ontario App., p. 122: "A map of the British Dominions in North America, according to the Treaty in 1763." By it Canada is shewn as extending south-westward to the Mississippi, and northward beyond the Lake of the Woods.

† See *ante*, p. 107, note.

The LORD CHANCELLOR.—I do not think it is possible that it can be contended that this map was intended to lay down the height of land.

Mr. MCCARTHY.—It does practially correspond with Mitchell's map, except that the Lake of the Woods is better placed.

Sir MONTAGUE SMITH.—It goes to the north of the Lake of the Woods, and goes across the height of land.

Mr. MCCARTHY.—Yes, the height of land was not intended to go round there at that date.

The LORD CHANCELLOR.—It crosses streams.

Mr. MCCARTHY.—The scale is so small that it is difficult to follow it.

Sir MONTAGUE SMITH.—There is "Canada" written just at the south of it.

Mr. MCCARTHY.—There is another copy of Mitchell's map [*handing it in*].

The LORD CHANCELLOR.—A reduced copy or a full copy?

Mr. MCCARTHY.—No, it is in sections.

The LORD CHANCELLOR.—Is it the Hudson's Bay Company who lay down the lines themselves?

Mr. MCCARTHY.—No.

The LORD CHANCELLOR.—I thought it was so.

Mr. MCCARTHY.—No. After the cession, the Hudson's Bay Company endeavoured to get all the evidence they could; and they were asked to send some maps,* and they sent four maps, amongst them Mitchell's.

Sir MONTAGUE SMITH.—It was one of their maps?

Mr. MCCARTHY.—Yes, but I mean it was not compiled by them at all. That map does lay down the height of land. Your Lordships will see distinctly that it is the height of land.

The LORD CHANCELLOR.—We cannot find it. Perhaps you will have it marked on the map.

Mr. MCCARTHY.—I will do that, my Lord. There is also a map there, very shortly after, of the Sieur Robert de Vaugondy. [*Their Lordships referred to the maps.*]

The LORD CHANCELLOR.—The material thing is, that the line is certainly south of the line of the award—not so very far from it; and I suppose it may be taken to be roughly laid down here, because it is north of the Lake of the Woods. Then the next thing is, does it appear on the face of this map [*Mitchell's*] for whom it was made?

Mr. MCCARTHY.—That was made for the Board of Trade and Plantations.

The LORD CHANCELLOR.—Made for the Board of Trade here?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—I see it is described by Mitchell to be for the Board of Trade and Plantations. The date is 1755?

Mr. MCCARTHY.—Yes, 1755 is the date.

The LORD CHANCELLOR.—

"This map is undertaken with the approbation and at the request of the Lords Commissioners of Trade and Plantations, and is chiefly composed from draughts, charts, and actual surveys of different parts of His Majesty's colonies and plantations in America; great part of which have lately been taken by their Lordships' orders and transmitted to this office by the Governors of the said colonies and others.

"PLANTATION OFFICE, February 13th, 1755." "JOHN POWNALL, Secretary."

So you could not have a higher authority, whatever its value.

* On the occasion of the Arbitration, in 1878.

Mr. McCarthy.—Just see how they mark Virginia—the two parallel lines of Virginia run right over the continent. On the other side of the Mississippi it is coloured in the same way. Your Lordship will see there is one straight line drawn there.

The Lord Chancellor.—Oh, no. Virginia does not extend this side of the Mississippi; certainly not. There is North Carolina, South Carolina, Georgia, Mexico, Florida, Arkansas.

Mr. McCarthy.—If your Lordship will roll up Mitchell's map, I think you will see it has written on it "The Land's Height."

The Lord Chancellor.—Yes.

Sir Robert Collier.—Here it is, "Northern Mountains or Land's Height," —do you say that goes everywhere?

Mr. McCarthy.—Yes, I take that to be a statement of the land's height and the boundary of the Hudson's Bay Company by the Treaty of Utrecht.

The Lord Chancellor.—"Bounds of Hudson's Bay, by the Treaty of Utrecht."* I see that, but you must not take it quite for granted that that relates to the whole of that red line. I do not see it marked to the west of the red line. I should doubt extremely whether your extension of the land's height is beyond here [*pointing on the map*].

Mr. McCarthy.—Perhaps the other map would shew that. It did not occur to me that there was any difficulty about that thing—that it was a description of the whole of the line.

The Lord Chancellor.—It is not at all evident to me on the face of the map.

Mr. McCarthy.—Perhaps the other Mitchell's map will throw a light upon it. There is one there before the Lord President.

Lord Aberdare.—The place of the land's height is written where mountains are figured.

Sir Montague Smith.—The "Northern Mountains."

Lord Aberdare.—The "Northern Mountains or the Land's Height" go below this line.

Sir Robert Collier.—There are no indications of mountains here at all.

Mr. McCarthy.—This seems to be a better guess at the real land's height than any of them [*referring to a map*].

[*Adjourned till Monday morning, 21st July.*]

FIFTH DAY.

Monday, 21st July, 1884.

The Lord Chancellor.—Before the argument proceeds, their Lordships desire to say something with reference to the course which it has taken, and which hereafter is to be taken. Their Lordships of course feel it their duty to sit as long as necessary to hear arguments that may be relevant to the real question, but they wish to put it to learned counsel whether travelling over vague and indefinite ground does conduce at all to the settlement of the real question, which is as to the actual boundaries to the west, and, if you please, to the north also. There have been a great many things referred to, which really have no

*No such bounds were ever settled by or in pursuance of the Treaty of Utrecht. See *ante*, p. 222, note *.

bearing at all on that question, but a vague and general bearing upon the claims of the Hudson's Bay Company, and so on. Their Lordships wish that the arguments should come a little to closer quarters, and whilst they must hear all details which the learned counsel, in the exercise of their discretion, think really material for the determination of the true question, yet they sincerely hope that having heard those details, the learned counsel who have to follow will at all events think it not necessary to repeat them.

Mr. McCarthy.—May it please your Lordships: I will endeavour, my Lords, as far as I possibly can, to comply with the wishes of your Lordships, and I have not, willingly at all events, referred to that which is immaterial.

The Lord Chancellor.—No, we quite follow that. It is not very easy in a boundary case to draw the line, which nevertheless their Lordships are very desirous to have drawn, if possible.

Mr. McCarthy.—I will compress the few observations that have to be made about the maps, and the references which I propose to make upon the maps which have been put in on both sides. The maps that have been already referred to, and which have been put in by Ontario, shew these things so far as it is important to consider them in this case. The contention, as I understand it, on the part of the Province of Ontario, is that the French had certain forts or posts in this disputed territory; and coming to close quarters on that particular point, the forts that I understand they claim are, first, the fort upon the Albany River called Fort St. Germain; secondly, the series of forts that were built by La Verendrye in 1738, or thereabouts*; and, thirdly, the disputed fort they speak of which had been put up by a man whose name is now called Duluth, north of the height of land.† I think, probably, I satisfied your Lordships on Saturday that that old fort put up by Duluth was south of Lake Nepigon.‡ Then, the fort on Albany River I admit was there; and your Lordships recollect the Hudson's Bay Company complained of it in 1715, and that the British Government afterwards insisted that the French should withdraw from that.§ I say that these maps put in by the other side shew that that fort was not there earlier;‖ and that is the first point I draw from the maps. The maps they put in are, one of 1703, which is the first map on this point, which does not refer to that fort, though it does to the other forts and the French Mission houses. The map your Lordship has before you is the photograph which we rely upon.

The Lord Chancellor.—Whether you rely upon it or not as of use to their Lordships, it is practically taken from Mitchell's map.

Mr. McCarthy.—What I am speaking about now is forts, and I say that the absence of any statement on the map of 1703,¶ the three maps of 1744, and

* Their erection extended over the period 1731-1749.

† Ontario shewed, and the evidence established, that besides these the French had several other posts and forts beyond the height of land, some founded before, and several after, the Treaty of Utrecht. See appendix B, hereto.

‡ Du L'Hut had a post at or near the mouth of the Nepigon River, and another on the northerly shore of the lake (Ont. App., 51, 101, 118); but Du L'Hut's post north of the height of land was separate and distinct from these. (Joint App., 624, 629).

§ What actually happened was that the English Commissaries under the Treaty of Utrecht proposed, as a part of their claim delivered to the French Commissaries in 1719, that the French should evacuate a settlement alleged to have been made by them at the source of the Albany in 1715, subsequent to the Treaty. The French paid no attention, nor made answer, to the demand, but continued in occupation of the post, and of the whole region of the upper Albany, until the cession of 1763.

‖ Fort St. Germain was first founded as early as 1673, when it was known as Fort Piscoutagany, (Joint App., 478,) and as to the maps, it appears on one of them as early at least as the year 1700, that is on Jaillot's, published in that year. (See Notes on Maps, Ont. App., 101).

¶ The map of 1703 is lacking not only in this but also in many other details otherwise well-established. It shews but a small section of the Albany, near the bay, and not at all that particular portion of the river where the fort in question was located.

the map of 1746, that were put in about this part that they speak of, indicates the two things which I contend for.*

Lord ABERDARE.—Before what date?

Mr. MCCARTHY.—Before 1703. Their contention is that this fort on the Albany River was put up in 1686 or thereabouts.

Lord ABERDARE.—I thought this Fort St. Anne was the same one.

Mr. MCCARTHY.—But there is no fort mentioned on that map.

Lord ABERDARE.—I thought Fort St. Anne was mentioned, not exactly on the Albany River, but close to it. The river is called the St. Anne's River.

Mr. MCCARTHY.—That is the Hudson's Bay post.

Lord ABERDARE.—This is the French map.

Mr. MCCARTHY.—But it is the Hudson's Bay post.

The LORD CHANCELLOR.—How does that appear?

Mr. MCCARTHY.—That appears from the statement made of the names of their posts.

The LORD CHANCELLOR.—Surely one may not lay too much stress upon names, but is it very likely that after the date of the Hudson's Bay Company the name of St. Anne would have been given by the English adventurers to one of their forts?

Mr. MCCARTHY.—That is on James' Bay—the bay itself, as I understand. That fort indicated there is on the bay, and not on the river.

The LORD CHANCELLOR.—That is a matter of measurement; but to me it seems that it is rather in the angle of land between the estuary of the river, if I may use that expression, and the bay than upon either the one or the other.

Mr. MCCARTHY.—There is no contention that there was any fort there. The claim is that there was a fort on what is called Perrai River, which is the Albany River. Then there was a fort upon the bay.

The LORD CHANCELLOR.—One wants really to see what the map represents. The name St. Anne I should have thought much more likely to be a French name than an English.

Mr. MCCARTHY.—Perhaps it is a French fort, but we must remember the history of it at that date. The French between 1680 and the close of that century, had forts and other possessions upon the bay. There is no dispute about that.

The LORD CHANCELLOR.—There is an exceedingly important circumstance which we shall have to consider, which is this, that the Hudson's Bay Company themselves, in 1701 I think, proposed or assented to, as a boundary consistent with the actual occupation, the line of the Albany River. That is one of the most important facts in the case.

Mr. MCCARTHY.—Yes; but what I ask your Lordship's attention to now is —and there is no dispute about it—that the French did occupy the bay, and captured six out of the seven forts erected there by the Hudson's Bay Company, and as a matter of fact gave their own names to them. The fort marked there is a fort upon the bay itself—James' Bay—and is not claimed to be a fort on the Albany River.

Lord ABERDARE.—On this map, Fort Albany, Fort St. Anne, and Fort Chechouan are all thought to be identical.

Mr. MCCARTHY.—Yes, they are identical forts called by the French St. Anne and by us Fort Albany; but on the bay, and not on the river. The claim set up is that there was a fort on the river before the commencement of 1700.

* The map of 1744, "Carte de la Baye de Hudson," and also the map of 1746, do, as a matter of fact, each shew the fort in question. The other maps of 1744 do not at all embrace this part of the territory—a circumstance overlooked by counsel.

The LORD CHANCELLOR.—As marked on this map of 1703 it seems nearer to the river than to the bay, and I should say rather on the river than the bay.

Lord ABERDARE.—If you follow the words "Fort St. Anne ou Quichichouen," you will find that will be on the bay rather than on the river. But the real question is whether these maps are sufficiently precise and whether it is likely there were two forts, one called Albany and this one.

Mr. MCCARTHY.—The name Albany is not given to that fort. They do not claim that as Fort St. Anne on the Albany.

Lord ABERDARE.—So far as the French possession is concerned, surely it is indifferent whether it was a few miles below the entrance of the Albany, or whether actually on the Albany itself.

Mr. MCCARTHY.—I do not mean to say so; but there are two or three forts there are disputes about, and two or three there are not disputes about. It must be understood, my Lords, that I freely admit that after 1682, when the French invaded Hudson's Bay, and captured these forts, they had posts on Hudson's Bay, which they continued to have until the English recaptured them after 1701; and then that matter was brought to a close by the Treaty of Utrecht, in 1713.

The LORD CHANCELLOR.—Is there any evidence of the subsequent possession by the English of those forts.

Mr. MCCARTHY.—Yes, that is equally as clear as the statement I make. All the correspondence I read with regard to the Treaty of Utrecht shews that the English recaptured those forts.*

The LORD CHANCELLOR.—There is a statement in 1755, at page 643,† that:

"Albany River, when the French settled upon it, was called Quitchide Chouen by the Indians, but we gave the name of Ste. Anne to the fort and river. That name long existed, and it is to be found in old maps. The river flows out of a lake of the same name, on the shores of which we had a post called St. Germain. The English built a factory there,‡ and called it Henley, but it amounted to very little."

Mr. MCCARTHY.—Now, to make myself clear to your Lordships on that point about the forts, I should like to say that at that time, about the commencement of the 18th century, the French and English were in possession of the Bay, and shortly before that the French had taken all but one of the seven posts which the Hudson's Bay Company had erected. Then the war broke out which ended in the Treaty of Utrecht. During that war the English recaptured some of those posts, but not all. At the Treaty of Utrecht it was insisted that the French should withdraw from those, and leave their cannon, and that was agreed to. There is no doubt about that. Then, in the year 1715, following the Treaty of Utrecht, the Hudson's Bay Company were put in possession of those posts and forts, and they always acknowledged that that was done to their satisfaction.§ All that I read to your Lordships on Saturday, and I need not refer to it again.

The LORD CHANCELLOR.—If you say that there is evidence that this fort St. Anne *de facto* passed, I should like you to refer to it

Mr. MCCARTHY.—I will give you that evidence.

Lord ABERDARE.—I think what you stated was that that part of the arrangement was really completed, but what was not finally completed was the final ratification of the boundaries.

* The English did not recapture those forts, but received those on the margin of the Bay by transfer subsequent to the Treaty of Utrecht, and pursuant to its provisions. Those of the interior were not transferred; they remained with the French until the cession of 1763. (Appendix B, hereto.)

† From Bellin's "Remarques sur la Carte de l'Amerique Septentrionale."

‡ That is on the river, not on the lake.

§ And yet the interior country, and the posts of the interior, remained in the possession of the French until the cession of Canada. Appendix B, hereto.

The LORD CHANCELLOR.—I should like to see the specific statement as to these particular forts which are past the boundary line of the award.

Mr. MCCARTHY.—In the first place, if your Lordships look at page 498* of the Joint Appendix, you will see what was insisted upon was not merely the forts but the cannon. That is before the treaty. Then if your Lordships will look at page 576 there is a letter from Lord Dartmouth.† I cannot give that fort separately because it was not dealt separately with.

Lord ABERDARE.—That is very important, because the French took a fort far to the north of that by a ship of war in 1706, during the war.

The LORD CHANCELLOR.—If you can shew nothing specific, then the question will remain in this position, that forts were to be given up, and forts were given up. What forts?

Mr. MCCARTHY.—All the forts.

The LORD CHANCELLOR.—"All" is a very large expression. There being certain territories in dispute as to whether they were French or English property, and the boundaries never being settled, it would be very useful if we could have it shewn that on one of the sides south of the disputed boundary certain forts were taken.

Lord ABERDARE.—The order of the French King for the surrender of the forts on Hudson's Bay, which is at page 576, would seem to include all the forts.

"M. Jérémie, commander of the forts and straits of Hudson's Bay, is commanded to deliver up to the bearer of the Queen of Great Britain's order, the Bay and Straits, together with all buildings and forts there erected."

Would they necessarily have included in the Bay of Hudson, James' Bay?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—At all events you must not yet assume that, and if this is the fort upon the river rather than upon the bay, might it not have been retained?

Mr. MCCARTHY.—If your Lordships desire me on that, I will go over it step by step, but I can prove it without that. All I say is that the correspondence proves it clearly and pointedly.‡ Your Lordships will see the French line laid down on that very map before you, [*viz*: *De l'Isle's map of 1703 already referred to*]. They never claimed north of that French line.§

The LORD CHANCELLOR.—There are two claims put down here. You yourself have admitted in 1701 something a little to the north of that line.

Mr. MCCARTHY.—No, my Lord, pardon me.

The LORD CHANCELLOR.—When I say, you yourself, I mean the Hudson's Bay Company.

Mr. MCCARTHY.—No; we never admitted it to be French. We denied it to be French, but said for the sake of peace we would accept it.

The LORD CHANCELLOR.—As a matter of fact, it was a boundary which the Hudson's Bay Company were willing to have accepted.‖

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* Report of the French plenipotentiaries to the King, 18th April, 1712.

† Lord Dartmouth to the Lords Commissioners of Trade and Plantations, February 19th, 1713.

‡ Counsel failed to specify the particular correspondence.

§ As a matter of fact they did claim, even after the Peace of Utrecht, that they were entitled not only to the whole of the interior, but also to such portions of the shores of the Bay as the English could not prove an incontrovertible prior title to. (Joint App. 513-15.)

‖ By their memorial of 29th January, 1701, the company proposed as their southern boundary the Albany River on the west side of the Bay, and the East Main River on the east side. On a previous occasion, also, by their memorial of 10th July, 1700, they had proposed the Albany; the Rupert River being then suggested by them as the limit on the east side. See these memorials, *ante*, p. 206, note ‡.

Mr. McCarthy.—Your Lordships will see all that was changed between 1701—the war following immediately—and the Treaty of Utrecht.

The Lord Chancellor.—It would be extremely important if we could see that the particular places which are now in dispute were treated as being English, and not as being French. If you cannot shew that, but rely only on the general words, we follow the argument, but it is not necessary to enlarge it in detail.

Mr. McCarthy.—The reference I gave your Lordships on Saturday does not make any distinction between one point and the other.

The Lord Chancellor.—If that is so, we must consider the force of general words in connection with other things.

Mr. McCarthy.—Yes. And then I would add to that, that your Lordships will see on the map before you [*De l'Isle's map of 1703*] that where the French desired the line to be drawn was south of James' Bay, south of the water line by a very considerable distance.

The Lord Chancellor.—Not a very considerable distance. Something very far short indeed of what you allege to be Hudson's Bay territory.

Mr. McCarthy.—But far south of these posts at that date.

Lord Aberdare.—You mean the line of 49°.

Mr. McCarthy.—No; that is our claim.

The Lord Chancellor.—It would cut off the mouth of the Albany River and retain a considerable part of these forts.

Mr. McCarthy.—But I say all the forts were north of that point. That is made plain by this, and I did not think there was any question about it. If your Lordships will look at the words used in 1744, at page 583:

"Extracts from the orders given by the Hudson's Bay Company to their chief factors in the bay in anticipation of an attack overland from Canada."

The Lord Chancellor.—What is the material part of it.

Mr. McCarthy.—It is addressed to "Mr. Joseph Isbister and Council, at Albany Fort." Albany Fort was St. Anne's Fort, one was the English and the other the French name.

Lord Aberdare.—There was a fort on the Moose River.

Mr. McCarthy.—And they had put up a factory at Henley, on the Albany River.

The Lord Chancellor.—Henley is on the north side.

Mr. McCarthy.—No, my Lord, on the south.

The Lord Chancellor.—Surely not.

Mr. McCarthy.—We afterwards put the Henley Fort on the Albany River 140 miles from its mouth.*

The Lord Chancellor.—I asked whether on its north or south side.

Mr. McCarthy.—I answer the south.

The Lord Chancellor.—I want to know from the map where it is.

Mr. McCarthy.—If your Lordship looks at Mitchell's map, it shews it very plainly.

* The Company, in their Memorial of 1750, say that Henley was 120 miles up the river.

The LORD CHANCELLOR.—There it is marked on the south side. This photograph which is taken from Mitchell's map shews it below, and the map we have been using marks it above the river and not below.*

Mr. MCCARTHY.—Then it is incorrect, because all the early maps mark it below the river.*

Sir ROBERT COLLIER.—You say the original Mitchell's map shews it.

Mr. MCCARTHY.—Yes, and I have another original map here which shews it—Henley Factory, on the Albany River.

Lord ABERDARE.—Would that be on the south side?

Mr. MCCARTHY.—Yes, and there are other maps where it is marked on the south side too.*

Lord ABERDARE.—Where do you suppose Fort St. Germain was?

Mr. MCCARTHY.—About the same place. In fact I have a statement that it was in the same place. The French say it was the same place, and that the Henley fort did not amount to much.† But the fort we have been speaking of was at the mouth of the river, and sometimes called the Albany Fort and sometimes Fort St. Anne.

Now, my Lords, the result would appear to have been that though in 1701 the Hudson's Bay Company proposed limitations, at the Albany River on one side, and at the East Main on the other, as their southern boundary, nevertheless the changes made by the war that immediately followed, so completely altered the complexion of affairs that they insisted then on getting the whole of the Bay and Straits of Hudson. The French acceded to that and surrendered all the forts on the bay and straits, giving up even the cannon.‡

Sir ROBERT COLLIER.—"The Bay and Straits of Hudson" is exceedingly indefinite.

Mr. MCCARTHY.—"The Bay and Straits" certainly meant all the forts on the bay and straits. How far back it went is another question.

Sir ROBERT COLLIER.—On the bay and straits, would not take you far.

Mr. MCCARTHY.—There were no inland forts there then at all. There is no pretence that there were any inland forts at all§.

Now we come to the treaty of 1713-14, when the Hudson's Bay Company were put in possession, under the order of the King. The French King gave the order. The Queen transferred the order to the Hudson's Bay Company to take possession, and they acknowledged the fact, and that is the last time the French ever

* Henley is represented on most maps as being on the north bank of the Albany, its true position; but on some as situate on the south bank. On the maps attached to Mr. Montgomery Martin's works on the Canadas and the Hudson's Bay Company's Territories respectively (the latter prepared at the instance of, and from materials furnished by, the Company), as well as on the map shewing the Company's territorial claims, prepared at the instance of the Company by their own geographer, Arrowsmith, for the House of Commons Committee of 1857, it is marked on the north side. These facts, with the strong probability that that position was the most favourable for purposes of defence against the French, determined its location on the map alluded to by the Lord Chancellor, viz., the Ontario Government Map, prepared for the Privy Council.

† The old maps place Fort St. Germain on the Albany, at its exit from Lake St. Anne, on the north bank, and considerably higher up the river than Henley. M. Bellin's statement (Joint App., 643), here referred to by counsel, may be read in agreement with the maps: "The English built a factory there"—that is on the Albany.

‡ Only the forts on on the margin of the Bay were surrendered, and not those inland. The surrender was not to the Company, but "to the Kingdom and Queen of Great Britain." (Treaty of Utrecht, art. 10), and, in view of all the circumstances enured, it was claimed by Ontario, to the benefit of the Crown, and not of the Company. And see *ante*, p. 190, note †, *post*, p. 331, note ‡.

§ On the contrary, the evidence shewed there were several, as Forts St. Germain, Abbitibi and Nemiscau, with others on the Moose and Abbitibi, and other rivers of the northern slope, and upon Lake Mistassini. (See appendix B, hereto.)

occupied on the bay.* The next occupation that we hear of of the French is on the Albany River, at the place where Fort Henley now is. That was complained of by the Hudson's Bay Company in 1719. In 1719, that complaint was represented by the British Commissaries to the French. And we do not hear anything more about the French Fort which they call St. Germain, subsequent to that period. But I rely on the maps which are put in of 1744, and I rely on the statements read of 1756, to shew that at the time of the cession, this Fort St. Germain had been practically abandoned. It does not appear in the list of forts given by Governor Pownall, nor in the list given by the two French officers to which reference was made by the other side, and to which I referred on Saturday. So that we may assume that Fort St. Germain was abandoned in obedience to the English demands.† Then, what happened with regard to that. In the documents in which the Hudson's Bay Company state the facts in 1748, after the Treaty of Aix la Chapelle, they state distinctly, and I draw particular attention to that—

The LORD CHANCELLOR.—Where is it to be found?

Mr. MCCARTHY.—I will give your Lordship the reference to that. It is at page 587, and it is 1759 I see. That is a later one. I must get the earlier one in a moment. The one of 1719 may be read. That is at page 578.‡ Then there is one of 1748, which I shall be able to give your Lordships in a moment.

The LORD CHANCELLOR.—At page 587, what is there there? I do not see anything there bearing upon the question of any importance at all.

Mr. MCCARTHY.—I will give it to your Lordship, because it is of importance with reference to the French posts.

Lord ABERDARE.—The French go on claiming steadily from time to time, up to 1750, and past that.

Mr. MCCARTHY.—No, my Lord.

Lord ABERDARE.—They go on steadily claiming their right to possession, and their legal possession, at one time or other, of part of Hudson's Bay.

Mr. MCCARTHY.—No, my Lord, I think not. When I say they do not, I want to be correctly understood. After 1719, when Lord Stair and Mr. Bladen,

* Not so. In addition to their intercepting the best part of the trade at their inland posts, their operations extended, at certain points, to the shores of the Bay, and in particular at the Rupert, which the Hudson's Bay Company abandoned, and at the Post à la Carpe, whose bounds extended to the shores. (See appendix B, hereto.)

† The evidence is in contradiction to all these contentions of counsel: (*a*) Fort St. Germain is depicted on the maps as late as 1762; (*b*) the very map of 1744 here referred to, produced before the Board, shews the very contrary of what is stated: it clearly shews the fort, on Lake St. Anne; (*c*) the statement of 1756, also here referred to, (Pownall's), is confessedly incomplete: "I have not been able to get an exact list of the forts in Canada, but the following is sufficient to sketch out the manner in which they conduct this service;" he informs us, as the fact was, that the "principal forts have subordinate forts dependent on them; they are yet independent of each other, and only under the command of the Governor-General . . . . and the officers and commanders are removed to better and better commands" Now St. Germain was a dependency of Nepigon as the principal post, and Pownall sets out the Nepigon and its dependencies as follows:—

"NIPIGON..... { Two or three. / One on the River Michipicoton. / One other on the Long River. / And one other."

Fort St. Germain may fairly be taken to be covered by one or the other of the two last mentioned; (*d*) De Bougainville gives the post of Les Nipigons, without mention of dependencies other than that it included La Carpe, which designation applied as well to a lake as to a stretch of territory: the limits of this latter were northward of Nepigon, and extending to the shores of Hudson's Bay, and access to it was by Nepigon; (*e*) that the French held the trade of the interior with numerous establishments, the Company confining themselves to the shores of the bay, appears by the several admissions of the Company as well as by many other pieces of evidence. (Notes on Maps, Nos. 55, 70, 76, 99, 108, 116, 124, the map of 1744, as produced. Joint App., pp. 580-5, 594-5, 602-3, 716; Ont. App., 28-9, 32-35; appendix B hereto).

‡ See *ante*, p. 112, note ‡.

on behalf of the English, endeavoured to have this line fixed between the French and the English, nothing appears to have been said more than that Lord Stair was unable to get the Commissioners to meet. He speaks of two meetings. At the first meeting, the commission was read, and then, at the second, the Hudson's Bay claims were presented. Then they never met again. Lord Stair writes to say that he had seen the Regent, and the Regent promised that he would name a definite period for the commissioners to meet, but he never did so.

Lord ABERDARE.—What I refer to is this, that in 1720—

Mr. MCCARTHY.—That is the time when the negotiations were going on under the Treaty of Utrecht. At that time they were trying to settle this limiting line.

Lord ABERDARE.—

"The fact is that at the time of the said Treaty of Utrecht, the French possessed one part of the Straits and Bay of Hudson, and the English possessed the other. It is very true that the King of France had some time before conquered the English part, and it is of this, that it has been understood that restitution is to be made, that is to say, to trouble them no more in their enjoyment; but with regard to the said lands possessed by the French in the said Bay, if they have previously belonged to the English, the King will bind himself in the same manner to make restitution to them. But there must be a real and incontestible proof of proprietorship."

That is at the top of page 514. Then you have extracts from M. de la Galissonière's *mémoire* in 1750, where the same claim was kept up, where they say again that they only restored that which the English could shew that they had before, and nothing else:

"The Treaty of Utrecht had provided for the appointment of commissioners to regulate the boundaries of Hudson's Bay, but nothing has been done in the matter. The term 'restitution,' which has been used in the treaty conveys the idea clearly that the English can claim only what they have possessed, and as they never had but a few establishments on the sea coast it is evident that the interior of the country is considered as belonging to France."

That is in 1750, and appears at the bottom of page 514. Again, in 1755, the same claim was put forward,* that the English had never got more than the lower part and mouth of the rivers, and it was to that portion that the restitution to be made was to be limited:

"There are no indications that the English commissaries who have been named to receive this restitution have demanded or required that the French should abandon the upper part of the rivers and the lakes."

The LORD CHANCELLOR.—It is clear that there were disputes.

Lord ABERDARE.—Yes, up to 1755.

The LORD CHANCELLOR.—Restitution, they said, we ought to make to you according to your previous title and possession. We admit that if you can shew a previous title to it we are to restore, but we are not to restore what was always ours. That is the principle upon which they were conducting the negotiations.

Lord ABERDARE.—In the instructions to M. DeVaudreuil on the next page,† they say:

"They (the English) have not yet explained themselves respecting the extent they propose giving their Hudson Bay boundaries. But it is to be expected that they will wish to stretch them to the centre of the colony of Canada, in order to enclose it on all sides."

* Joint App., p. 514. † *Ibid.*, p. 515.

Sir ROBERT COLLIER.—

"However that may be, His Majesty is firmly resolved to maintain his rights and his possessions."

Mr. MCCARTHY.—Those were secret instructions and they do not appear to have ever been communicated.* In point of fact, your Lordship will find that they never were communicated.* They did not meet or present to the English commissioners their claims at all.† These were secret instructions from the King to the officers, but they were never communicated to them.*

The LORD CHANCELLOR.—The probability is that they must have in some way or other transpired.

Mr. MCCARTHY.—No; I think not

The LORD CHANCELLOR.—Where do you get them from then?

Mr. MCCARTHY.—They were got from the French documents—the public records of France, or some of them, and also from Quebec. We have got possession of plenty of papers there.

The LORD CHANCELLOR.—However, it does not seem to be of much importance.

Mr. MCCARTHY.—We put before your Lordships the statement of how it occurred.

The LORD CHANCELLOR.—These papers will be evidence to shew what view the French took pending the negotiations for the settlement of the boundaries under the Treaty of Utrecht, but not of course any evidence that their views were right.

Mr. MCCARTHY.—Then, my Lord, here is the Hudson's Bay statement of it at page 572. This is before the Treaty.

The LORD CHANCELLOR.—That is in 1711.‡

Mr. MCCARTHY.—Then, in 1714, at page 577, the representation of the Hudson's Bay Company is:

"That pursuant to the 10th article of the Treaty of Utrecht they did, the beginning of June last, send a ship for Hudson's Bay, and therein a governor, one Captain Knight, and his deputy, one Mr. Kelsey, to take possession of the whole Bay and Straits of Hudson, together with all other places relating thereto as mentioned in the said articles, they having not only Her late Majesty (of blessed memory) Her commission for the same purpose, together with one from the company, but likewise the Most Christian King's order, under his hand and seal, with a power from the Canada Company, to deliver up the same according to the said treaty, which ship at the request of the said Canada Company, is not only to bring away the French settled in Hudson's Bay, but likewise their effects, pursuant to the aforesaid treaty, they paying freight for the same, which ship may be expected the latter end of September or the beginning of October next."

The LORD CHANCELLOR.—It was not necessary to read this passage.

Mr. MCCARTHY.—I think that is a passage which supports me.

* These Instructions were of course not communicated, nor intended to be communicated, to the English; but they are published in the authoritative source from which they have been reprinted in the Joint Appendix as the private Instructions of the King, communicated to M. de Vaudreuil on the occasion of his appointment to the Governor-Generalship. They provide for his course in various contingencies liable to arise at a critical period, when it might not be possible or politic to await the result of inter-communication with the distant home government. (Paris Documents, Col. Hist., N. Y., vol. 10, pp. 290-3; where also an extract from the General Instructions to Vaudreuil is given).

† Counsel here confounded two quite different things—the action of the commissaries under the Treaty of Utrecht, in 1719, and the Royal Instructions to the Marquis de Vaudreuil, in 1755. It is true that the French commissaries of 1719 made no reply to the propositions of the English commissaries, because of these being considered inadmissible; but it is manifest that this had nothing whatever to do with the Royal Instructions of 1755.

‡ Printed *ante*, p. 211, note.

The LORD CHANCELLOR.—That shews nothing whatever as to what particular forts were delivered up.

Mr. MCCARTHY.—Except that it says, all of them.

The LORD CHANCELLOR.—It does not say all of them even.

Mr. MCCARTHY.—Doesn't it, my Lord?

The LORD CHANCELLOR.—Well, which are the words that shew that? I cannot see it. They want somebody to receive that which was to be delivered; it does not shew anything whatever.

The LORD PRESIDENT.—The French only intended to deliver up that which they [the English] had before.

The LORD CHANCELLOR.—It is clear that that was the principle that they went on, whether it was right or wrong. That was the principle which they meant to insist on in the settlement of the disputes.

Mr. MCCARTHY.—Your Lordship wanted me to point out the statement of what took place under the treaty, at the time of the negotiations.

The LORD CHANCELLOR.—Surely you went at length through those negotiations.

Mr. MCCARTHY.—I thought I had gone through the whole of them.

Sir ROBERT COLLIER.—I do not think we wish you to go over the same ground again. I do not think we want that.

Mr. MCCARTHY.—Then, if your Lordships will look at page 510, you will find the statement I have made as to what took place with the negotiations, from Mr. Bladen. It is dated the 7th of November, 1719, and it is at line 30, commencing with that paragraph.

The LORD CHANCELLOR.—What has that to do with it except that their time was wasted?

Mr. MCCARTHY.—A little more, my Lord, I think:

"Our time was spent in preparatory discourses concerning the intent of the 10th Article of the Treaty of Utrecht, relating to the boundaries of Hudson's Bay; and at our next meeting, which will be to-morrow, at my Lord Stair's house, we design to give in the claim of the Hudson's Bay Company, in writing, with some few additions pretty material for their service,* in case the Abbé Dubois his health will allow him to be there, which I fear it will not, for he is confined at present to his bed. But I confess, I cannot help thinking it will be to very little purpose to puzzle ourselves about settling boundaries, by treaty, in the North of America, if the French have so concise a way of fixing theirs in the South, without asking our concurrence; it is to be hoped they will have the modesty to recede from this new acquisition."

Then follows a further letter—

The LORD CHANCELLOR.—Now I really wish to remonstrate with you against reading letters so absolutely useless. It does not go to any point whatever.

Mr. MCCARTHY.—Perhaps your Lordship will pardon me for referring to the next letter. There is a great mass of matter, and I will endeavour not to read more than is necessary. At the foot of page 511, your Lordship will see:

"My Lord Stair has spoke to the Regent, who said immediately that the conference shall be renewed whenever we please: His Excellency then desired His Royal Highness would appoint a day, which he promised to do. This is what the Regent has promised my Lord Stair once every week for four or five months past, without any effect, and His Excellency does not expect any more from the promise now, though possibly a conference may be appointed for form sake. I have been here near six months, and have seen only one conference, which was appointed by my Lord Stanhope's desire; I think there had

* As to these unauthorized additions, see *ante*, p. 159, sub-note [1].

been two conferences before I came ; at the first of them the commissions were read, and at the second, my Lord Stair and Mr. Bladen gave in a memorial about the limits of the Hudson's Bay Company, to which no answer has been made."*

That is what I desired to point out and that is the reference we have to it.

The LORD CHANCELLOR.—What possible bearing has that upon any question which we have before us ?

Mr. MCCARTHY.—Your Lordships were urging a moment ago that it was important to know what the statement of the French claim was.

The LORD CHANCELLOR.—We have got it.

Mr. MCCARTHY.—I want to point out that the French never presented that claim to the English.

The LORD CHANCELLOR.—You say so, and you are entitled to assume it, but the document is before us in which the statement of the claims of the French is put out of question, and the principle upon which it is to be construed is expressed in the clearest and plainest terms. Whether that other document was presented or not can make not the slightest difference.

Mr. MCCARTHY.—I think it does make a difference, and therefore I read that passage to your Lordship.

The LORD CHANCELLOR.—If you could shew that any negotiations proceeded to the point at which they waived that and took up other ground, that might be important.

Mr. MCCARTHY.—All I can shew is, and I believe it to be the fact, that they did not make any pretensions of that kind to the English. Now, will your Lordships look at what I have been trying to find for some time, namely, the Hudson's Bay Company's Memorial in 1750.† It is in the Manitoba Appendix, page 24.

Sir ROBERT COLLIER.—We have had this before us, and I have marked it.

Mr. MCCARTHY.—I am going to refer to the passage which your Lordships seemed to require, at the foot of page 25 :

"That your memorialists have used the best endeavours in their power to prevent the French making any encroachments on the British territory in those parts, and particularly at the south end of the said bay, where, by the neighbourhood of the French, there is most to be apprehended. Your memorialists have made a settlement many years since upon the principal river there, called Moose River, which runs at a great distance south into the bay, and have also erected a post mounted with cannon for the defence of the settlement, and preventing the French entering the bay by any navigation down that river ; and your memorialists, on another principal river, called Albany River, that likewise falls into the bay, towards the southward thereof, and comes a great way from the west, erected another fort called Henley, at the distance of 120 miles up that river, your memorialists thereby endeavouring to guard their territories both to the south and west against the French frontier, and which forts and settlements of your memorialists are maintained and supported by them at considerable expense. And your memorialists have in like manner for their further defence towards the west "—

that I do not think I need read.

The LORD CHANCELLOR.—Of course, this is a document which is to the purpose, and it certainly refers to the posts on the Moose and Albany Rivers.

* The extract is from a letter of Mr. Pulteney to Mr. Secretary Craggs, dated Paris, 4th May, 1720, and continues as follows :—"I must own that I never could expect much success from this Commission, since the French interests and ours are so directly opposite, and our respective pretensions interfere so much with each other on the several points we were to treat about ; but that the French have not been willing to entertain us now and then with a Conference, and try how far we might be disposed to comply with any of the views they had in desiring the Commission, cannot, I should think, be accounted for, but by supposing they knew we came prepared to reject all their demands, and to make very considerable ones for ourselves."

† See some extracts *ante*, pp. 229, 230, text, and 229, note †, 230, note *.

The words which you have just read seem to deserve attention: "Your memorialists thereby endeavouring to guard their territories both to the south and west against the French frontier."

Mr. McCarthy.—Yes, my Lord, it shews at all events that there was no acquiescense on the part of the Hudson's Bay Company, and also shews that at this point Fort Henley, they had withdrawn from.

Lord Aberdare.—It shews that the frontier must have come up uncommonly close to the Hudson's Bay.

Mr. McCarthy.—So it did, my Lord.

Lord Aberdare.—They were at Fort Abbitibi, which is immediately south of the bay, and you will see that there is very little distance between the fort which they erected at Moose River and Fort Abbitibi, which is immediately to the north of the height of land, and south of James Bay.

Mr. McCarthy.—The distance I will give your Lordship exactly, but that was the fort, that was the place they speak of, and that was the danger they apprehended of the French from the contiguity of Canada.*

Lord Aberdare.—The French claim in the various papers which they put in that they have occupied all this country, coming from the south, that they have come up almost to the borders of Hudson's Bay, and that all that the Hudson's Bay Company could claim would be the borders of the bay.

Mr. McCarthy.—That is what the French were claiming, and the English claimed that the Hudson's Bay boundary went down to the 49th line. That was the difference between them, and as a matter of fact the Hudson's Bay Company were in possession, and went into the interior as far as the Moose River, a distance of 150 or 120 miles or whatever it is.†

* Not from Fort Abbitibi alone was the danger to be apprehended: See the list of old posts retained, and new posts established, by the French to the north of the height of land after the Treaty of Utrecht, in appendix B, hereto; also a list of the posts of the North-West, established after the same treaty, and never objected to by the English Government or the Hudson's Bay Company (*Ib*); also sec. II. of the same appendix; and as to the position of the French and the Company, respectively, immediately before the treaty, see the Company's memorial of 1711, *ante*, p. 211, note.

† The real facts were different from this. It was in evidence, and in fact admitted by the Company, and also so found by the agents appointed in the interests of the Dominion and Manitoba to make researches for the purposes hereof, that the Company never went into the interior in the region of the Moose, or, except so far as Henley was concerned, elsewhere, during the French *regime*, nor for a long time thereafter. Moose Fort was at the mouth of the river, and the very memorial of 1750 referred to by counsel sets out that the object of its erection was for "preventing the French entering the Bay by any navigation down that river . . . and to guard their boundaries to the south against the French frontier." In a statement of the Company printed in 1857, and furnished by them for the purposes of the arbitration of 1878 as to these boundaries, they say: "As long as Canada was held by the French, the opposition of wandering traders was insufficient to induce the Company to give up their usual method of trading. Their servants waited at the forts built on the coast of the Bay, and there bought, by barter, the furs which the Indians brought from the interior. But after the cession of Canada to Great Britain in 1763, British traders, following in the track of the French, penetrated into the countries lying to the north-west of the Company's territories, and by their building factories brought the market for furs nearer to the Indian seller. The Company finding their trade seriously affected, extended the field of their operations and sent parties to establish themselves in the interior. In process of time, all smaller opposing interests were absorbed, either by purchase or coalition in the North-West Company of Montreal, which thus became the sole rival and competitor to the Hudson's Bay Company. During many successive years, a most disastrous contest was carried on between these two Companies." (Joint app. 594.) Mr. Goschen, chairman of the Company at the time, in a letter of 12th December, 1876, to the Secretary of State of Canada, conveying information for the purposes of the same arbitration, says: "At the time of the passing of the Quebec Act, 1774, the Company had not extended their posts and operations far from the shores of the Bay. Journals of the following trading stations have been preserved bearing that date, namely: Albany, Henley, Moose, Eastmain, York, Severn and Churchill." (Joint app. 594-5.) And Messrs. Bischoff, Bompas and Bischoff, the London agents of the Dominion instructed to make researches, write on 22nd March, 1877, to the Secretary of State of Canada: " . . We have been engaged almost continuously since the date of your last letter in searching the records of the Hudson's Bay Company. . . . . From a perusal of the Company's journals, we find that it was not the practice of the Company's servants to go up country to purchase peltry from the Indians; but the Indians came down to York and other forts on the Bay and there exchanged their furs, etc., for the Company's merchandize. It appears that the 'pedlers,' as they were called, from Quebec had for some time prior to the year 1773 gone up into the Red River district, and by

The LORD CHANCELLOR.—What is the distance between the fort at Moose River and Fort Abbitibi? As far as I can guess it must be over 100 miles.

Mr. MCCARTHY.—I think we can give your Lordship the exact distance if it becomes material.

Lord ABERDARE.—It is about three degrees.

Mr. MCCARTHY.—It is about three degrees between the two forts. And the French proposition, if I can find it, I think is important.

The LORD CHANCELLOR.—It is not possible to describe the Moose River fort as a frontier fort.

Lord ABERDARE.—No, and there is Fort St. Louis which is said in this map to have been built before 1686.

The LORD CHANCELLOR.—That is the fort I say, there is no evidence of being a frontier fort.

Lord ABERDARE.—Nor Fort St. Jacques or Fort Charles

Mr. MCCARTHY.—That I say there is evidence about. There is a fort at Abbitibi which is a frontier fort.

The LORD CHANCELLOR.—You cannot seriously contend that Moose Fort is a frontier fort. It is a considerable distance at the extreme north of Fort Abbitibi.

Mr. MCCARTHY.—I say so. It was not a frontier fort but a fort upon the river for the purpose of meeting the attacks of the French.

The LORD CHANCELLOR.—No; they have altered their expression, because at page 26 they say: "Your memorialists thereby," that is by the erection of these, Moose and Henley Forts, "endeavoured to guard their territories both to the south and west against the French frontier."

Mr. MCCARTHY.—Yes; my Lord.

The LORD CHANCELLOR.—Does not that imply that they were frontier forts?

Mr. MCCARTHY.—I do not think so, my Lord.*

Lord ABERDARE.—It implies that they [the French] must have come very close up to them.

Mr. MCCARTHY.—It implies this, my Lord: We say all the trade was done by these rivers, and what they dreaded was that the French might penetrate

so doing had cut off the Indians and bought their furs, and so prevented their taking them to York Fort and the other settlements and forts on the Bay. It was to prevent this that in the year 1774, one Mr. Hearne was sent down to establish a station up country, which he accordingly did at Cumberland House. In the same year, Matthew Cocking started on a journey to the Red River district, but no settlement was made there until some 15 years later. In his journal of this journey he mentions 'that pedlers swarmed there every year.' 'An old pedler called Young Deer residing there;' that 'the natives were corrupted by the pedlers having so long resided there,' and speaks of Franceways settlements on the Saskatchewan River. These pedlers were both English and French, but seem to have come from Quebec. . . . . We have not taken extracts from the Post Diaries, inasmuch as we can trace no direct evidence calculated to support counsel's theory of prior discovery by the Hudson's Bay Company, and the foregoing [reflects] the general impression produced upon our minds by perusal of the Post Diaries, as also of sundry published histories of the district, in the Company's Library, such as 'Robson's Hudson's Bay,' published 1752, 'Remarks upon Captain Middleton's Defence, by Arthur Dobbs,' 1744, and 'Carver's Travels in North America,' 1766." (Joint app., 715-17.) And see also Joint App., 580-5.

* The Hudson's Bay Company, in their memorial of 1750, dispose of this question, by shewing that the French frontier approached Fort Moose from the south, and Fort Henley from the west: "Your memorialists have used the best endeavours in their power to prevent the French making any encroachments on the British territory in these parts, and particularly at the south end of the said Bay, where, by the neighbourhood of the French, there is most to be apprehended. Your memorialists have made a settlement many years since upon the principal river there, called Moose River, which runs from a great distance south into the Bay, and have also erected a fort, mounted with cannon, for the defence of the settlement and preventing the French entering the Bay by any navigation down that River; and your memorialists, on another principal river, called Albany River, that likewise falls into the Bay towards the southward thereof, and comes a great way from the west, erected another fort, called Henley, at the distance of 120 miles up that river—your memorialists thereby endeavouring to guard their territories, both to the south and west, against the French frontier." (Memorial of 1750, copy in "Ontario Boundaries before Privy Council.") Fort Moose was on the Bay, at the mouth of the Moose River

down by these streams, and they erected these forts for the protection of their business on Hudson's Bay. That is how I understand it. In one of the papers put in by the other side[1] there is a clear explanation of all that, and your Lordships will understand that readily on a moment's reflection. Those who were at the sources of the rivers could congregate their forces and prepare for an attack, because it was a very simple and easy thing to do to go down the stream and attack the people at the mouth of the stream, and that was one of the reasons why in early times they said that it was necessary to give the boundary limited by the watershed, because if an enemy or another power was allowed to come in at the source of the stream they could gather their forces together, before any preparations could be made to meet them, whereas if they had to come over the height of land, the time required for the preparation, and the time of the passage, would give notice of their approach and enable a defence to be made. That is stated by one of the French gentlemen whose *memoires* have been put in by my learned friends on the other side,* and it is a good and plain reason why the line of the height of land should be accepted as the line of limitation between powers in this savage wilderness.

This fort at Lake Abbitibi I propose to say a word about bye and bye. All I think we have is this, that the French fort at Fort St. Germain was not there till 1714 or 1715. There is no evidence of its being there before that.† Then that fort seems to have been withdrawn, and in its place Fort Henley was substituted by the Hudson's Bay people.† Then the only other fort to the north of the height of land was Fort Abbitibi,† and let me tell your Lordships when that was built.

Sir ROBERT COLLIER.—Fort Henley was substituted for Fort St. Germain ?[2]

Mr. MCCARTHY.—Yes, my Lord, it is the same place, and consequently Fort St. Germain was withdrawn.† The French withdrew from that place and we find no mention of it,† or any mention of their forts at a later place. Then the other fort which they had in the country north of the height of land was Fort Abbitibi. Now, that fort was erected at the time that the invasion of the Hudson's Bay was made in 1686 by a man of the name of Troyes.‡ He went there to attack the Hudson's Bay party, and his party erected Fort Abbitibbi, and that remained in the possession of the French until the time of the cession. That was the reason probably why the Hudson's Bay people suggested that the 49th parallel should be their boundary, because their Lordships will see it is immediately north of Fort Abbitibi.

Lord ABERDARE.—If this map is to be any guide at all, the country both in Lower Canada—the portion of Canada called Quebec—and, on the other side, the portions awarded to Ontario by the arbitrators is covered by French forts.

*Dumas' *memoire* on the boundaries of Canada, 1761, Joint App., p. 526, which, on this particular point, had reference, not to the boundaries towards Hudson's Bay, but to those to the southward of the Great Lakes, and towards Louisiana. The Hudson's Bay Company never put forward a claim to any of the boundaries proposed by them on this particular ground, nor at all to the height of land until Lord Selkirk's time, and then on the pretence that the charter justified the claim, and invoking, later on (that is, upon the present proceeding), the language of the Treaty of Utrecht in support. This latter pretension was summarily disposed of by their Lordships as hereinbefore appears (pp. 216-218).

†The evidence as to all this is clearly to the contrary, as has been already set out. *Ante*, pp. 221, note ‡, 278, notes *, † and §, 279, note †; appendix B, hereto.

‡The Chevalier de Troyes, commissioned by the Governor-General to proceed overland against the English establishments on the shore of Hudson's Bay. The expedition consisted of one hundred men, officered, under de Troyes, by the Sieurs d' Iberville, de Sainte Hélène and de Marincourt, and MM. Duchesnil and Catalogne. Establishing a post at Abbitibi on the way, they captured, first, Fort Moose, and then Fort Rupert, and bringing with them the heavy guns from those places, they placed them in battery against Fort Albany, which was forced to capitulate. (Ont. App., 7; Joint App., 570-1, 626-7.)

Mr. McCarthy.—I have again to say that until your Lordships find proof of that—and no proof is to be found or offered in the books before you—I ask your Lordships not to accept it. There is no pretence for it on the evidence.* My friends have given no reference to it,* and I have looked carefully to see, and I can find no reference except to these forts which I mention.* I think, probably, the reason why the Hudson's Bay people proposed the 49° line as the line of demarcation is because it gives to the French this Fort Abbitibi.† Then, with reference to Fort St. Germain, I have spoken of that, and I have said all that I wish to say about that; I need not weary your Lordships by repeating it. Then, if your Lordships are satisfied about that, we will come to the next series of forts which they claimed, and those forts are shewn upon a map which has been put in.

The Lord Chancellor.—What is Fort St. Louis mentioned in this map of 1703?

Mr. McCarthy.—Where is that?

Lord Aberdare.—Fort St. Louis is down in the south of James' Bay.

Mr. McCarthy.—That was one of the forts of the Hudson's Bay Company that had been taken. Your Lordships will remember that up to that time the French were in possession actually of six out of seven of the forts of the Hudson's Bay Company.

Lord Aberdare.—Did they give it a new name, because, I suppose the Hudson's Bay people would not call it Fort St. Louis.

Mr. McCarthy.—No; they gave a new name; they called these forts by different names.

The Lord Chancellor.—It is the Moose Fort.

Lord Aberdare.—It is called Fort St. Louis.

Mr. McCarthy.—Everything they called by French names, for instance York Fort they called Fort Bourbon, and Fort Albany they called Fort St. Anne. I am not quite sure that they changed the name of Fort Rupert,‡ but they gave different names to these forts generally. These forts on the Bay, as I have said over and over again, were undoubtedly in the possession of the French, captured by them from the English, and were restored by the Treaty of Utrecht, so that I think your Lordships will find that I am correct when I say that all the forts on the Bay which they did occupy were given up by the Treaty of Utrecht. The other fort was built on the River Albany in 1714, and with the exception of that fort and Fort Abbitibi, and the forts erected by Verendrye subsequent to that in 1738, there are no forts which have any bearing on the question which your Lordships have to decide.§ I am desirous of confining my observations as much as possible to those matters which appear now to me to be important. Now, if your Lordships will follow me and look at map No. 84, coming down to the other forts, your Lordships will see exactly where they are. I have never denied that there were forts. It is a small map in the brown coloured collection.

Lord Aberdare.—That is a map of 1750.

Mr. McCarthy.—A map of 1750, and that is said to be a map marking the forts to the west, by M. Verendrye.

* On the contrary, the evidence was clear, and easy to find, in the books before the Board. See appendix B, hereto.

† This scarcely accords with counsel's previous contentions, that the line of 49° was proposed because of its being practically the same as that of the height of land, and that its adoption would be convenient, by reason of the difficulty of following the irregular line of the height of land. (*Ante*, pp. 221, 235.)

‡ They named it Fort St. Jacques.

§ On the contrary, there were many other forts having such a bearing, as hereinbefore already appears. But see appendix B, hereto, where the particulars are brought together. Verendrye's forts were erected 1731-1749.

Lord ABERDARE.—Is this an English or a French map ?

Mr. MCCARTHY.—A French map.

Sir ROBERT COLLIER.—From whose custody does it come, the Hudson's Bay Company ?

Mr. MCCARTHY.—No, my Lord.

Lord ABERDARE.—It is from the Depot de la Marine.

Mr. MCCARTHY.—Yes ; from the Marine Department. Now, your Lordships will see on the right hand side is all that is shewn on the map of Lake Superior. Then following a chain of waters your Lordship will see the forts.

The LORD CHANCELLOR.—That is not what I have got. I have got one which is a chart of the new discoveries in the west of Canada.

Mr. MCCARTHY.—That is the one, No. 84, my Lord.*

The LORD CHANCELLOR.—I do not see Lake Superior at that point.

Mr. MCCARTHY.—I am pointing out what is Lake Superior ; but it is not marked. On the right hand side your Lordship will find Lake Superior.

The LORD CHANCELLOR.—Do you mean where the map ends ?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—For instance, it is called " Partie du Lac Superieur."

Mr. MCCARTHY.—Yes ; it is, as a fact.

The LORD CHANCELLOR.—Then, that makes Lake Winnipeg discharge itself into Lake Superior ?

Mr. MCCARTHY.—No, my Lord, the height of land is marked immediately afterwards.

The LORD PRESIDENT.—It does look as if the watercourse was continuous.

The LORD CHANCELLOR.—It looks as if these lakes met and discharged themselves into the Bay of Hudson and also into Lake Superior ?

Lord ABERDARE.—In all the maps, it is difficult to make out the different systems.

Mr. MCCARTHY.—That is really the height of land there which is marked, but up to that time it was hardly known. I think this is the first map in which we find any mention of the height of land. All the other maps shew this water system draining into Lake Superior and being a part of the St. Lawrence system.† Now if your Lordship will follow that up to the lake called Rainy Lake.

Lord ABERDARE.—There is no doubt that the source of the river which flows into Lake Superior is very close to the source of the river that flows into Lake Winnipeg. It is like the Severn and the Wye, which take their rise within a very few miles of each other.

The LORD CHANCELLOR.—Whether you can or cannot divide the waters at this point may be a question, but here on this map it is not of course very important.

Lord ABERDARE.—What is the map supposed to shew ?

Mr. MCCARTHY.—It is supposed to shew the forts or posts which were founded or erected by Verendrye, and if your Lordship will follow it, you will find that it puts that down exactly. Your Lordship will see at Rainy Lake, Fort St. Pierre.

* No. 84 in the Notes on Maps, Ont. App., p. 110: "Carte des nouvelles Découvertes dans l'Oüest du Canada, dressée sur les Mémoires de Mr. de la Veranderie, et donnée au Dépôt de la Marine par Mr. de la Galissonière, 1750." Galissonière was Governor-General at the time.

† Some maps prior to this date shew the division of the waters properly, and some erroneously as here stated, but most of them are silent. After 1750, Mitchell's, of 1755, and other maps, perpetuate the error. To this error in Mitchell's, which was the map by which the framers of the treaty regulated their proceedings, is ascribed the drawing of the international boundary line of 1783 through the Long Lake, so called, and the intervening waters, to the most north-westernmost point of the Lake of the Woods, there shewn as the head of the St. Lawrence system. (Documents relating to the Boundaries of Ontario, 1878, p. 136*u*, notes * and ‡.) The French explorers must have known the exact height of land from a very early date.

That is the first fort. Then, if your Lordship will follow on to the next lake, which is the Lake of the Woods, you will find south of that Fort St. Charles. Then, if you will go to Lake Winnipeg, you will find another fort on the east side of that; and if you will still follow on to the west you will find, at what is called the Lake of the Prairies, Fort Dauphin and also Fort La Reine. These are the forts which that gentleman erected and this is the map shewing where he erected them.

The LORD CHANCELLOR.—These are all forts of the Western Sea?

Mr. MCCARTHY.—Yes; there are the forts he erected. What I draw attention to is that this line of forts is on the boundary line between Canada and the United States and south of the awarded territory. It is on the very line which is the southern boundary of the awarded territory.

The LORD CHANCELLOR.—Some of them are in the awarded territory?

Mr. MCCARTHY.—Speaking generally, they are on the line. One is to the north, Fort St. Pierre. Fort St. Charles is to the south. This line of forts is on the line which is southward of the territory.*

The LORD CHANCELLOR.—There is a Fort Caministiquia?

Mr. MCCARTHY.—That is further north. I understand that Pigeon River is south of that. There is no doubt that Fort Caministiquia is not on this chain.

Sir ROBERT COLLIER.—This map is altogether wrong. The Rainy Lake is put as to the north when it is to the south.

Mr. MCCARTHY.—Still it is accurate enough so far as the forts are concerned. I rely upon them.

Sir ROBERT COLLIER.—It is an inaccuracy which is material.

Mr. MCCARTHY.—It is not my evidence. It is their evidence. They have put it in and I must accept something. It is the only evidence which your Lordships have of where these were.†

Sir ROBERT COLLIER.—It is altogether wrong. The Rainy Lake is put as to the north but it is to the south, and the Hudson's Bay is wrong.

Mr. MCCARTHY.—That is out of place.

Sir ROBERT COLLIER.—It is as wrong as possible.‡

Mr. MCCARTHY.—All the maps are.§ He puts them down on this water communication. We find it was the water communication he took. At that date he could not have got into this country except by water communication. Up Pigeon River, Long Lake and the Lake of the Woods was the only means of communication in those days. There is no doubt that is where he erected the forts. That is, at all events, the proof which is offered to us. The result of

* If any, only Fort St. Charles, which was erected in 1732, is to the south of the international line of 1783; the map puts it on the south shore of the Lake of the Woods. This, however, does not affect the principle, as this fort dominated as well the territory to the north as that to the south of the Lake of the Woods. The map shews also Fort Bourbon, at or near the mouth of the Saskatchewan.

† Only one piece of evidence, and not the most important. Their establishment and particular locations are as much settled matters of history as the discovery of Marquette and Joliet, or the explorations and exploits of Cavelier de la Salle. (See de Bougainville's account of them, *ante*, p. 94, note: the account of Thos. Jefferys, the English geographer and historian, in 1761, *ante*, pp. 143-4; and M. Margry's account. Ont. App., p. 11, *et seq*. The British and Canadian traders who entered the country after the cession of Canada, as for instance Alexander Henry and Sir Alexander Mackenzie, give testimony in regard to the old French forts; as to Henry, see *ante*, p. 238, note *, and Ont. App. pp. 51-3; Mackenzie, *ante*, pp. 92-4, and Ont. App. p. 64.)

‡ The map in question is a sketch transmitted by the Governor-General to the Department of Marine and the Colonies, shewing, with very sufficient though not scientific clearness, the chief water communications, both lake and river, from the mouth of the Pigeon River on Lake Superior to the northerly head of Lake Winnipeg, and out of this direct route, Lake Manitoba with its narrows, the Red River and the Assiniboine, together with the chain of forts—each in the proper position—founded by Verendrye. The Saskatchewan also is shewn as discharging into Lake Winnipeg, and this lake into Hudson's Bay.

§ And yet maps of the greatest geographers of their particular time—English, French, Italian, etc.—were put in or referred to. (Notes on Maps, Ont. App., 95-130.)

See *supra*, note †.

what I have said, so far as it appears to me, that there is not one fort that goes to justify in any sense the claim which is made here by the Province of Ontario after the Treaty of Utrecht. The only possible fort they could rely upon was the Fort St. Germain, and that fort was withdrawn, as I think I have offered sufficient proof to shew.* The other forts are south of the line† and cannot justify the northern boundary assumed or taken by the arbitrators.‡ Here is a map which is the same as theirs only different in colour.

Now as to the forts the Hudson's Bay Company occupied. That, I take it, is the next question which properly comes up.

The LORD CHANCELLOR.—There does not seem any evidence that there was any fort of the Hudson's Bay Company, before the Cession, further inland than this.

Mr. MCCARTHY.—Ten years afterwards we have the Cumberland Fort.

The LORD CHANCELLOR.—That is in 1774.

Mr. MCCARTHY.—Yes. The next fort we have is in 1790. That is called Red Lake.

The LORD CHANCELLOR.—Anything done at that lake cannot affect the limit between the provinces.

Mr. MCCARTHY.—But it does affect the territory as between the Crown and the Hudson's Bay Company.§

The LORD CHANCELLOR.—There is no question as to that part of the territory.

Mr. MCCARTHY.—Your Lordship will see that Red Lake was down—south of all.

The LORD CHANCELLOR.—Where is that ?

Mr. MCCARTHY.—That is south—in the portion that was awarded afterwards to the United States.

The LORD CHANCELLOR.—I see Red Lake. I do not see the fort.

Mr. MCCARTHY.—That is where it is put.

Mr. MOWAT.—There are two or three Red Lakes. The fort was on the northern Red Lake.

Mr. MCCARTHY.—I will give your Lordship the evidence about it.

Lord ABERDARE.—What is the date ?

Mr. MCCARTHY.—1790.

Lord ABERDARE.—That was included in the cession afterwards to Lord Selkirk ?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—It strikes me it may possibly be important. I should like to know where the references are. It is apparently just outside the western boundary. It may possibly be material ?

Mr. MCCARTHY.—Yes.

Mr. MOWAT.—Before 1790, Red Lake was ceded to the United States.

The LORD CHANCELLOR.—It strikes me at present that this may be important.

Mr. MCCARTHY.—Will your Lordship allow me to hand that in later. I cannot detain your Lordship for that. I cannot find the reference at the moment.

The LORD CHANCELLOR.—I am a little surprised, considering the position of Red Lake that you should not have it in the front of your artillery.

Mr. MCCARTHY.—I have it marked, but I have not the place where it is referred to. I know it is mentioned in two or three places, but I cannot lay my hand upon it at the moment.

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* The evidence proved the very contrary. See *ante*, pp. 221, note ‡, 278, notes *, † and §, 279, note † ; appendix B, hereto.

† See *ante*, p. 289, note *.

‡ But this was only one element of the considerations which guided the arbitrators in their finding.

§ The Company were not thereby put in any better position as towards the Crown than the other British subjects, whether corporations or individuals, who occupied or had posts in the territory, and that antecedently to the Hudson's Bay Company.

The LORD CHANCELLOR.—Then we will postpone it.*

Mr. MCCARTHY.—If your Lordship will kindly do that, I think I can find it. Then, there was another fort.

Lord ABERDARE.—Will you look at page 590.

Mr. MCCARTHY.—It is at page 716 of the Joint Appendix, if your Lordship will pardon me. It is a letter from Messrs. Bischoff, Bompas & Bischoff, agents for the Dominion: "The following are the dates of the establishment of the earlier posts of the Hudson's Bay Company in this district." It is a document from the agents of the Dominion, which is admitted to be correct. It is put in by both parties. It is from searches they made.† "The following are the dates of the establishment of the earlier posts of the Hudson's Bay Company in this district: Cumberland House, 1774. Red Lake, 1790."

The LORD CHANCELLOR.—And Lac la Pluie, 1790.

Mr. MCCARTHY.—That is the next I am coming to.

Mr. MOWAT.—That is away in the north.

Mr. MCCARTHY.—No.

The LORD CHANCELLOR.—Either that statement is admitted to be correct, or it is not. If it is, we can take it on the admission of both sides.

Mr. MCCARTHY.—I will state to your Lordship what we have agreed to. All in the Joint Appendix we submit to your Lordships.

Sir ROBERT COLLIER.—For what it is worth?

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—You agree that whatever is stated in this letter from Messrs. Bischoff, Bompas & Bischoff is matter of fact?

Mr. MCCARTHY.—Yes; I understand it is agreed as a matter of fact it is correct. What value is to be attached to it is another question. Is not that so, Mr. Mowat?

The LORD CHANCELLOR.—If your opponent says so, we shall know where we are.

Mr. MOWAT.—We admit they are substantially correct. There are little errors of detail.

The LORD CHANCELLOR.—Do you admit it?

Mr. MOWAT.—With regard to Red Lake, there are several Red Lakes. My learned friend chooses to put this Red Lake away to the south, but that is not the Red Lake referred to here at all.

Mr. MCCARTHY.—That is an arguable point, but it is a fact that a fort is established at a Red Lake.

The LORD CHANCELLOR.—If that is in dispute, this statement of Messrs. Bischoff, Bompas & Bischoff will not relieve you of the necessity of identifying it.

Mr. MCCARTHY.—No. All it says is a fort was erected at Red Lake. We have now to prove where that Red Lake is. We say it was in the south.

Mr. MOWAT.—My learned friend overlooks that that Red Lake is in the United States. It is part of the ceded territories.

Mr. MCCARTHY.—I do not overlook that at all. I perfectly well understand it is ceded territory, but as late as 1811 the Hudson's Bay Company granted that

* The fort was on the northern Red Lake and outside the awarded limits. See, as to this misapprehension of counsel, *ante*, p. 238, note †.

† "The following are the dates of the establishment of the earlier posts of the Hudson's Bay Company in this district:

Cumberland Ho	1774	Brandon Ho	1794
Red Lake	1790	Edmonton "	1795
S. Branch do	1791	Carlton "	1797
Lac la Pluie	1790	Lake Winnipeg	1795
Swan River	1790	Assiniboils River	1793
La Crosse, Athabasca	1791	Red River	1799"

(Joint App. 717.) Further extracts from this letter are given, *ante*, p. 284, note †.

ceded territory to Lord Selkirk and were treating it as their own. I perfectly understand it was ceded. Lord Selkirk's grant included this very territory in 1811.

The LORD CHANCELLOR.—So we have understood.

Sir MONTAGUE SMITH.—That is the date of the earlier posts?

Mr. MCCARTHY.—Yes.

Sir MONTAGUE SMITH.—And this is 1790.

The LORD CHANCELLOR.—Let us follow it if we can.

Mr. MCCARTHY.—The proof we adduce is this: Will your Lordship look at page 590. That is a list in 1821 of the posts of the Hudson's Bay Company,*

*STATIONS OF THE HUDSON'S BAY COMPANY, AND THE NORTH-WEST COMPANY, RESPECTIVELY, AT THE PERIOD OF THEIR COALITION, 1820-21.

[Statement furnished by the Hudson's Bay Company for the purposes of the Arbitration.]

HUDSON'S BAY COMPANY'S STATIONS.

Northern Department.

1. York.
2. Severn.
3. Churchill.
4. De Island.
5. Deers Lake.
6. Rock Depôt.
7. Island Lake.
8. Norway House.
9. Beren River.
10. Lake La Pluie.
11. Red River.
12. Upper Red River.
13. Manitouba.
14. Swan River.
15. Cumberland.
16. Carlton.
17. Edmonton.
18. Lesser Slave Lake.
19. Isle à la Crosse.
20. Athabasca.
21. Peace River.
22. Great Slave Lake.

Southern Department.

1. Moose.
2. New Brunswick.
3. Kunogumesee.
4. Michipicoton.
5. Albany.
6. Henley.
7. Martin's Falls.
8. Osnaburgh.
9. Red Lake.
10. East Main.
11. Neisquiscar.
12. Woswonappy.
13. Rupert's Store.
14. Whale River.

NORTH-WEST COMPANY'S STATIONS.

1. Fort William Depôt.
2. Milles Lacs.
3. Fort George (Columbia).
4. Williamette River.
5. Ney Percés.
6. Thomson's River.
7. Okenagan.
8. Spokan.
9. Flat Heads.
10. Koutonnais.
11. Rocky Mountain House.
12. Fort Chipewyan (Athabasca).
13. Forks, Fraser River.
14. Fraser's Lake.
15. Stewart's Lake.
16. McLeod's Lake.
17. St. Johns.
18. Dunvegan.
19. Isle aux Sources.
20. Fort Vermilion.
21. Fond du Lac.
22. Moose Deer Island.
23. Fort Providence.
24. Rivière au Liard.
25. Fort Alexandria.
26. Fort Good Hope.
27. Lesser Slave Lake.
28. Lac la Biche.
29. Isle a la Crosse (English River).
30. Green Lake.
31. Lac la Loche.
32. Lac la Rouge.
33. Lac Carribaux.
34. Fort Augustus (Fort Des Prairies).
35. Rocky Mountain House.
36. Pembina River.
37. Moose Lake.
38. Montee or Crossing Place.
39. Cumberland House.
40. Moose Lake House.
41. Swan River.
42. Fort Dauphin.
43. Alexandria.
44. Rivière la Biche.
45. Fala Perdrix.
46. Beaver Creek (Red River).
47. Rivière la Souris.
48. Grande Pointe.
49. Rivière au Pembina.
50. Forks.
51. Fort Alexander (Lake Winnipeg).
52. Rivière au Morts.
53. Tête au Brochet.
54. Lac du Bonnet.
55. Grand Etière.
56. Lac la Pluie.
57. Vermilion Lake.
58. War Road.
59. White Fish Lake.
60. Lac des Isles.
61. Lake Nipigon.
62. Sturgeon Lake.
63. Lake Lat.
64. Scabitechewan.
65. Red Lake.
66. Lesser Sturgeon Lake.
67. Abimonde Lake.
68. Pic.
69. Long Lake.
70. Black River.
71. Michipicoton.
72. Matagame.
73. New Brunswick.
74. Batchewanan Bay.
75. Petoubeau.
76. Sault Ste. Marie.
77. Mitsisague (Lake Huron).
78. La Cloche.
79. Island Post.
80 S. E. Lake.
81. Lake Temiscamingue.
82. Abitibi.
83. Waswanipi.
84. Grand Lac.
85. Matawacamingue.
86. Flying Post.
87. Fort Coulogne (Ottawa River).
88. Sandy Lake.
89. Round Lake.
90. Tadousac (King's Posts).
91. Chicoutimi.
92. Lake St. John.
93. Isle de Jérémie (Mingan).
94. Seven Islands.
95. Mingan.
96. Lake of the Two Mountains.
97. Chats.

[It will be observed from this double statement, how much more extended the operations, and more numerous the posts, of the North-West Company.]

and in the Southern Department your Lordship will find Red Lake. This is only evidence of where this lake was.

Lord ABERDARE.—And there is a Red River in the Northern Department.

Mr. MCCARTHY.—There is a Red River in the Northern Department. No doubt there were two forts at different times, but the only important one is this one.

The LORD CHANCELLOR.—You say the Hudson's Bay Company, in 1820, had a station at Red Lake, in the United States Territory.

Mr. MCCARTHY.—Yes, my Lord.* And we also say that is evidence that this Red Lake Fort referred to in Messrs. Bischoff, Bompas & Bischoff's letter is the same.

Lord ABERDARE.—Is it the Southern Department that you are referring to?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—They are Albany, Henley, and various other places.

Mr. MCCARTHY.—Your Lordship will see Michipicoton.

Lord ABERDARE.—All these places seem to be north.

Mr. MCCARTHY.—My learned friend says that is north of Cumberland House. Cumberland House is reckoned in the Northern Department, No. 15. It is called the Northern Department. It cannot be that Red Lake; it is the Red River.

The LORD PRESIDENT.—Cumberland House is reckoned in the Northern Department.

The LORD CHANCELLOR.—Red River is in the Northern Department.

Mr. MCCARTHY.—Yes. It is next to Cumberland House, and is marked there as having a fort.

Lord ABERDARE.—Why are Albany and Henley in the Southern Department?

Mr. MCCARTHY.—That is the way they classify them. There is Moose and New Brunswick directly south of James Bay. They classify this as the Southern Department. Churchill and the others went much further north.

The LORD CHANCELLOR.—It may be a point of great importance. Can we take this as identifying the position.

Mr. MCCARTHY.—I know of no other Red Lake. If my learned friends can point it out it will be a different thing.

The LORD CHANCELLOR.—Have you any map shewing your forts about that time?

Mr. MCCARTHY.—No; we have no such map at all. The only map we had was a map of an earlier date, and it has been mislaid. I know of no other Red Lake.

The LORD PRESIDENT.—I do not know what Lac la Rouge means. I do not know that it does mean Red Lake.

The LORD CHANCELLOR.—Can you shew us the position in the same neighborhood of any of these forts? Can you identify any others? I observe that the Rainy Lake is put into the Northern Department.

Mr. MCCARTHY.—So it is. Your Lordship will see, if you look at the map, where the Department extends to. It is not perhaps a very correct geographical demarcation.

The LORD CHANCELLOR.—Where is there an ancient map shewing the Northern and Southern Departments?

Mr. MCCARTHY.—I do not think there is any map to be found. We can only trace it out from the forts. Henley is put in the Southern Department.

* As to this misapprehension of counsel, see *ante*, p. 238, note †.

The LORD CHANCELLOR.—Everything we know is there. Everything we really know is there, and then you ask us to take this word, which may very likely occur in several places, as referring to this particular position. Take another example to shew how very difficult it is to go by these names only. In the Southern Department I see New Brunswick and Michipicoton. Michipicoton is put down on a part of Lake Superior within the unquestionable territory of Canada.

Mr. MCCARTHY.—Yes; but undoubtedly it was in the Southern Department of the Hudson's Bay Company all the same. They had forts north of Lake Superior.

The LORD CHANCELLOR.—If you admit the Hudson's Bay Company had forts not in their own territory, this does not go very far to shew this was in their own territory.

Mr. MCCARTHY.—They had forts admittedly in what is now Ontario—Michipicoton, for example.

The LORD CHANCELLOR.—This map does not help you then. It seems that as in the undisputed territory of Ontario, or Canada as it was, they had this fort at Michipicoton; so in what is now the undisputed territory of the United States they had this fort of the Red Lake.

Sir ROBERT COLLIER.—I observe Red Lake and South Branch ditto. There are two forts—one the Red Lake, and the other the South Branch—at page 716.

Mr. MCCARTHY.—I am told, my Lord, and shall be able to put in a document if it is denied, that the distinction between the Northern and Southern Departments was that the forts supplied by one of the factories were in the Northern, and all supplied by Moose Factory were in the Southern. I shall put in a document of the Hudson's Bay Company to shew that.

The LORD CHANCELLOR.—That may be so, but the moment we see this includes Michipicoton we see it has not necessarily much bearing.

Mr. MCCARTHY.—It has not as much force as if it had not included Michipicoton, but I think it has some bearing, and I use it as it occurs. The next series of forts it is important to look at.

The LORD CHANCELLOR.—What is New Brunswick?

Mr. MCCARTHY.—It is marked on this map. It is in the awarded territory south of James' Bay. It is marked nearly at the head of the Moose River.

Lord ABERDARE.—That was the North-West Company's post.

Mr. MCCARTHY. That is what they say. There were posts, I fancy, of both parties there.

Lord ABERDARE.—You will see New Brunswick in this map we have before us.

Mr. MCCARTHY.—Both parties had forts at that place. The North-West Company had a fort there as well. There were rival forts.

The LORD CHANCELLOR.—It being admitted that Michipicoton was in Ontario, this does not prove that New Brunswick was not.

Mr. MCCARTHY.—No, my Lord, of course not—not conclusively. Now, if your Lordships will come to page 590, your Lordships will find the forts the Hudson's Bay Company had at that date. It is at the time of the union between the companies. Your Lordships will find the Hudson's Bay Company's posts are in the Northern and Southern Departments—twenty-two in one and fourteen in the other.

Sir ROBERT COLLIER.—I observe among the North-West Company's stations, Lac la Rouge (32).

Lord ABERDARE.—Lac la Rouge is the Red Lake.

Sir ROBERT COLLIER.—No. It is called Lac la Rouge in the North-West Company's stations, and very probably it would be that station north of Cumberland House.*

Mr. MCCARTHY.—Now, I think I have done with the different posts on both sides, and I come now to the position in which the Company stood at a little later date. The next thing in point of time which I ought to refer to, I think, is the formation of the Red River colony, of Assiniboia, as it was variously termed. There are two pieces of evidence which I offer for that: first the evidence of Judge Johnson, who was the recorder there, as I said.

The LORD CHANCELLOR.—What is the date?

Mr. MCCARTHY.—1838, I think it is, my Lord.

Sir MONTAGUE SMITH.—Is that the date of the foundation of the Colony?

Mr. MCCARTHY.—Yes, my Lord.

The LORD CHANCELLOR.—That is the date of Lord Durham's commission?

Mr. MCCARTHY.—Yes, about that. I propose to say a word about that.

Mr. MOWAT.—I do not admit the propriety of looking at Judge Johnson's evidence. It is in the Manitoba Appendix, and it is *ex parte* evidence, given before a Committee of the House of Commons of Canada quite recently.

The LORD CHANCELLOR.—Yes, but there is so much that would not, according to the strict rules of evidence, be admissible; and the nature of the enquiry is one which cannot be limited by strict rules of evidence.

Mr. MOWAT.—No; I quite admit that.

The LORD CHANCELLOR.—It would hardly be of equal importance with a a public document, if one should be found, tending in the opposite direction.

Mr. MCCARTHY.—They do not—they quite agree.

The LORD CHANCELLOR.—We shall see.

Mr. MCCARTHY.—I will first point out this, if your Lordships will allow me.

Lord ABERDARE.—Where is Judge Johnson's evidence to be found?

Mr. MCCARTHY.—His evidence commences at page 70 of the Manitoba Appendix.†

The LORD CHANCELLOR.—What was Judge Johnson's position?

Mr. MCCARTHY.—He was Recorder,‡ but now is a Judge in Lower Canada. If your Lordships will look at page 73, you will see this:

"It was in the year 1839, on the 13th of March, at a General Court held in the Hudson's Bay House, London, that the District of Assiniboia was erected, and was declared co-extensive with such portion of the territory"—these are the words of the Order—"granted to the late Thomas, Earl of Selkirk, on the 12th of January, 1811, as is now within the domains of Her Britannic Majesty. That is what constituted the District of Assiniboia, and it is constituted *de facto*. Whatever its precise extent, it has certainly been recognized by a series of acts by the British Government."

The LORD CHANCELLOR.—As far as the Hudson's Bay Company's claim is concerned, if that is correct, they claim to be entitled to make this district in 1839.§

* The true name would appear to be Ronge—Lac la Ronge. (Hudson's Bay Company's maps of 1850 and 1857, by Arrowsmith, and Wyld's map of the Company's territories accompanying Mr. Montgomery Martin's Hudson's Bay.)

† The *ex parte* argument of this witness, cited in the following pages, in favour of the view that the so-called district of Assiniboia was a properly constituted colony of the Hudson's Bay Company, within the territorial limits of their charter, or received Imperial recognition as such, is fallacious, not borne out by the statements put forward by him in support, and moreover at variance with the consensus of evidence bearing upon the point, before the Board. And see *ante*, pp. 241, note †, 297, note *.

‡ The Company had no authority to make such an appointment. See *ante*, p. 241, note †.

§ It is noteworthy that the assumed power to erect such a district in this quarter was not attempted to be exercised until the amalgamation of the Hudson's Bay Company and the North-West Company as one Company had been accomplished, and a license of exclusive trade granted to the united body. *Ibid.*

Mr. McCarthy.—Yes.

Lord Aberdare.—That did not touch the territory that was settled by the Award.

Mr. McCarthy.—No; but it goes up to the boundary line. It recognizes the Lord Selkirk grant.

The Lord Chancellor.—Of course, as it came from the authority which made that grant, there is no wonder it recognized it.

Mr. McCarthy.—Then we find this colony was recognized on several occasions by the British Government. They sent out troops, as Judge Johnson tells us, and he gives the history of this.*

The Lord Chancellor.—You admit Assiniboia, whatever the authority that made it, is to the west of the disputed territory.

Mr. McCarthy.—Yes, my Lord, because south of the disputed territory was then the United States.

Lord Aberdare.—It is not the present District of Assiniboia?

Mr. McCarthy.—No; it is south of the water communication which forms the boundary, and it takes in a little to the east of the line at the north-west angle. It does not take in all at the west. The line at the north-west angle is the arbitrator's award, and to the east of that there is some little portion which is part of Lord Selkirk's grant, which took the water communication up through the centre of the Lake of the Woods, so to that extent it did encroach and pass over the important point of departure, and I look at it as a document, with reference to all that happened, of the very greatest consequence. Now I will go to question 303.

The Lord Chancellor.—You say it included a small part of the Lake of the Woods?

Mr. McCarthy.—More than that; where does your Lordship mean?

Lord Aberdare.—Just at that little black line going through the upper part of the Lake of the Woods. That is the eastern part of the grant to Lord Selkirk, and therefore that does come within the district of Assiniboia.

Mr. McCarthy.—It is an irregular piece of land, but at all events the importance of it is that it is to the east, and many miles to the east, of the line of the north-west angle of the Lake of the Woods.

The Lord Chancellor.—I suppose you do not say that anything took place about this Assiniboia which made it part of Canada.

Mr. McCarthy.—No, but I say it was not Canada. Your Lordship will see at that time Canada was making no pretensions.† Your Lordship will understand that?

The Lord Chancellor.—Oh, yes.

Mr. McCarthy.—They recognized the colony of Assiniboia.‡ Now I will read question 303, page 72:

"Was the colony of Assiniboia recognized by the Imperial Government and in what way? The existence *de facto* of the colony of Assiniboia was certainly recognized

* There was no recognition. See *ante* p. 241, note †, *post*, p. 297, note *.

† The pretensions of Upper Canada subsisted from the foundation of the Province, and had been publicly asserted from time to time, as—in addition to the Order in Council, and the proclamation of 1791—by Lieutenant-Governor Simcoe, on several occasions; by the Chief Justice of Upper Canada in connection with the Lord Selkirk troubles; on the occasion of the De Reinhard and other trials, etc., etc.; and the rights of the Province, and of British subjects generally, had been throughout successfully maintained by the North-West Company of Montreal, as against the Hudson's Bay Company. The latter Company had never succeeded, nor had its grantee, Lord Selkirk, in giving effect to their pretensions to exclusive territorial rights in this region.

‡ There is no evidence of any such recognition. See *ante*, p. 241, note †, *post*, p. 297, note *.

in a variety of ways, and in the most authoritative manner, by the Crown of England, in a series of acts that admit of no doubt whatever. They sent the 6th Regiment there in 1846 or 1847 under Colonel Crofton. They were sent by orders of the Duke of Wellington to occupy that place, so that in view of any trouble in respect of the Oregon question they might be made available on the other side of the mountains. However that was, they were sent there. After that, when I was sworn in as Governor, in 1855, after the retirement of Colonel Crofton and the troops, I made a demand for troops for the purpose of keeping order, and I got troops commanded by Major Seaton. They sent out a company of a hundred men of the Canadian Rifles, British troops in the pay of the British Government, and they were quartered there some years."*

The LORD CHANCELLOR.—At present it seems to me that your object is to shew that the limits of the colony of Assiniboia as laid down by the company were recognized by the Government as the limits of the colony.

Mr. MCCARTHY.—Of course, I cannot say that absolutely. All I say is that the Hudson's Bay Company, claiming this part as Rupert's Land, formed a colony, appointed a governor to administer the laws and so on, and was in this way acknowledged by the Imperial Government.

The LORD CHANCELLOR.—Supposing the Hudson's Bay Company laid down the boundaries of Assiniboia, what evidence have we that the Imperial Government recognized it?

Mr. MCCARTHY.—If the Hudson's Bay Company claimed this part of Rupert's Land, formed a colony, appointed a governor, appointed judges, and executed the laws so far as to execute a man,† and the British Government recognized that, I think it is very good evidence indeed.

The LORD CHANCELLOR.—This is evidence of nothing else than that the Imperial Government recognized a colony under that name properly formed, but not that it acknowledged it within certain boundaries. I think you have shewn enough to satisfy us that the Hudson's Bay Company took upon themselves to make a grant to Lord Selkirk, and to make that grant coterminous with this Assiniboia. It is clear that if the Hudson's Bay Company did that, and that it was recognized, it goes a good way to establish your contention.

* The sending of the troops in 1846-7 in the Imperial interest, in view of the Oregon question, can hardly be said to support the theory of a recognition of Assiniboia; neither does the stationing there of the Canadian Rifles, for the Imperial Government was in nowise bound to aid the Company in this manner or to maintain law and order in any of their territories or pretended territories. On the contrary, the Company's charter provides for their doing this themselves, and at their own expense. After provisions for the ordinary administration of justice "by the governor and his Council of the several and respective places where the Company shall have plantations," etc., the Company are empowered, "in case they conceive it necessary, to send ships of war, men or ammunition, into any of their plantations, forts, factories, or places of trade aforesaid, for the security and defence of the same, and to choose commanders and officers over them; and to give them power and authority, by commission under their common seal, or otherwise, to continue to make peace or war with any prince or people whatsoever that are not Christians," etc. The Company are thus in a position to deal, in regard to any of their settled places, as well with external trouble, caused by the surrounding Indian nations, as with internal disorders. The circumstances mentioned by the witness, of these troops being not only furnished but the cost paid by the British Government, in themselves prove that as in the case of the first body of troops, so also this detachment must have been sent there for Imperial purposes, and doubtless the full history of the event when it is disclosed will so shew. And see *ante*, p 241, note †.

† The Company had all these powers, except the power of appointing judges, under their charter, in their own territories. The charter provided, not that a judge, but that the Governor of the particular plantation and his Council, should sit as a court of justice. Ontario claimed that the evidence shewed that the exercise of these powers in this region was a usurpation, as being outside the territorial limits of the charter. The existence of a settled body of people at the Red River was an established fact, which had nothing to do with the other questions. The North-West Company of Montreal had been the controlling power there, and the population was chiefly composed of their governing men, their families, servants, *engagés* and dependents, with Hudson's Bay Company's people and remnants of Lord Selkirk's broken up colony. They existed until 1839 as a settlement or colony *de facto*, and it was not until the amalgamation of the two Companies at that time, leaving in their place no corporate rival interest to dispute their course, that the united body, adopting the charter name, assumed to exercise here the charter powers.

Mr. McCarthy.—If your Lordship will pardon me, it is a question of finding out from what took place at the time what were the facts.

The Lord Chancellor.—You have not shewn that the Government recognized the boundaries, or that any commission was appointed to consider these boundaries.

Mr. McCarthy.—I should have thought that if the Government had recognized the governor of the colony they had recognized the colony.

The Lord Chancellor.—It is sufficient evidence of recognition of a certain jurisdiction, but it is not evidence that it extends to other jurisdictions. If it does not include the United States territory, why should it include Canada.

Mr. McCarthy.—Because it did specially exclude the United States territory.

The Lord Chancellor.—There is nothing whatever in the charter mentioning it as a boundary.

Mr. McCarthy.—I can only offer it with all deference to your Lordships. I submit it does. If I cannot convince your Lordships, of course, it is my misfortune.

Lord Aberdare.—This portion was an infinitesimally small portion of the whole colony.

Mr. McCarthy.—But at that time there was no pretence that Ontario went up to the Lake of the Woods.

The Lord Chancellor.—This matter was not present to the mind of anybody at the time.

Mr. McCarthy.—The next question is 347.

Lord Aberdare.—It is as well to have in our minds that this territory was not granted by the Hudson's Bay Company to Lord Selkirk but by the Old Canada Company.

Mr. McCarthy.—No, my Lord.

Lord Aberdare.—Yes, you will find it is so stated by the judge whose evidence you referred to just now. Mr. Justice Johnson in answer to question 319:

"How did Lord Selkirk come into the possession of that vast territory called Assiniboia, and how did it pass afterwards into the hands of the Hudson's Bay Company? The Old Canada Company called the North-West Company gave certain rights in the first instance."

Mr. McCarthy.—I will prove that by the evidence before the House of Commons, which I have here, Lord Selkirk made a settlement in 1808 before the grant was made, and in 1811 the grant was made. The settlement of that colony proved a disastrous failure, involving a great amount of expense, and although they had made a grant to Lord Selkirk to enable him to carry out his intention of settling that colony, they afterwards bought it back and gave him £100,000 * for it, and they then established the colony of Assiniboia.

Sir Robert Collier.—In 1836 they bought it back.

Mr. McCarthy.—Yes.

The Lord Chancellor.—I think you are quite right. Lord Selkirk held under both companies, and at all events he held under the Hudson's Bay Company, because you have referred to the grant. This witness of yours says that Lord Selkirk was a usurper and had no authority at all. I am very much under the same impression. I think it was the United States territory. I think that is quite clear.

Sir Robert Collier.—He says it was established as a colony in 1839.

* Counsel subsequently makes correction as to the amount, *post*, p. 300.

Mr. McCarthy.—That is what he says. I will give your Lordships a piece of evidence from the Report from the Select Committee of the House of Commons on the Hudson's Bay Company in 1857. Your Lordships will see the way I put it is this—in the first place I say the Hudson's Bay Company claimed the height of land; that is the first point. If they had the right to claim the height of land, it is clear that Ontario did not go further than the height of land. Then we find they are continuing that up to 1836, so far as that grant to Lord Selkirk was concerned. There is no doubt about that, and if that be so—and there is no departing from it—how can the Award be sustained as to the territory so granted to him?

Now I propose to shew that there was no settlement of the country. At page 77 he is asked about the settlement made on Rainy Lake and the Lake of the Woods. It must not be forgotten that there was no settlement of any kind, not at Fort William,* not between the height of land and Lake Winnipeg. There is no question of that. There is one thing which I wish to correct, and to remove an erroneous impression from your Lordships' minds. I made a concession the other day rather too widely, and I want to take that back. I said that Upper Canada laid out this part in townships; that is not so.

The Lord Chancellor.—In 1798, an Act was passed to lay out townships and districts, and then there are two laid out.

Mr. McCarthy.—That is not the point I am upon. I made a concession the other day that Upper Canada laid out this part in townships; that is not so. My friends will bear me out that I am right in that. Before the confederation it is quite true that Upper Canada had been making mining leases, but there were no settlements or townships there.

Mr. Mowat.—There were small settlements but no townships.

Mr. McCarthy.—No townships. Since that date Ontario has laid out a portion of this height of land in townships.

Mr. Mowat.—The whole of it.

Mr. McCarthy.—My friend says the whole of it, and I have no doubt he is right, but not beyond the height of land. Now I shew that there are no settlements here, between Rainy Lake and the Lake of the Woods. My friend, Mr. Mowat, is not quite accurate in saying that the census was never taken† At that time the census was taken by Canada, which at that time was Upper and Lower Canada combined. But at that time there were no people to be reckoned, so it would not throw much light upon the matter one way or the other. Now let us refer to the evidence before the House of Commons Committee, which I have here.

The Lord Chancellor.—There is a passage at question 347 which I do not think you have referred to.

Mr. McCarthy.—That is the one I just read.

The Lord Chancellor.—He says in answer to that question:

"About the Rat Portage and Fort Frances there were several French half-breed families settled."

That is at the Lake of the Woods.

* The evidence does not say so; and Fort William is conceded to have been the headquarters and chief entrepôt of the trade of the North-West Company of Montreal up to the time of their amalgamation with the Hudson's Bay Company.

† A reference to the report (*ante*, p. 82) of what the Attorney-General said shews, firstly, that there is here attributed to him something that he did not at all say, and, secondly, that what he did actually say was perfectly accurate.

Mr. McCarthy.—That is at the head of Rainy Lake, he says. The particular portion which he speaks of, he says in answer to the next question [*Question 348*], is at the head of Rainy Lake.

The Lord Chancellor.—But there is nothing on this map to show that. You see the question is:

"Were any settlements made on Rainy River or Lake of the Woods?"

And the answer is:

"You cannot call them settlements. I have known eccentric individuals who settled there, one of whom was a Mr. McLeod, but there were no settlements of any importance. About the Rat Portage and Fort Frances there were several half-breed families settled"

Mr. McCarthy.—I am told there is only Rat Portage; and it is not of much consequence whether it is at the Rainy Lake or the Lake of the Woods.

The Lord Chancellor.—This gentleman speaks of several French half-breed families settled there almost on this part of Assiniboia.*

Mr. McCarthy.—I will now go to the evidence before the House of Commons, in 1857. This is not printed among the documents before your Lordships and we shall either have to print it or perhaps your Lordships can refer to this copy. It is the evidence given before a Select Committee of the House of Commons, in the year 1857, on the Hudson's Bay Company's claims. It goes into the whole of the claims of the Hudson's Bay Company—in point of fact, into the whole of their claim, rights and privileges. Chief Justice Draper, the Chief Justice of Canada, was present and was examined as a witness.

Sir Montague Smith.—What have you there, a manuscript?

Mr. McCarthy.—No; the original document itself. It is the report of the Committee on the Hudson's Bay claims, with all the questions, answers, and appendices, and so on; and it is in the year 1857. I will refer your Lordships to the evidence of the Right Honourable Edward Ellice. I think he was then the chairman of the Hudson's Bay Company.† He speaks about the grant to Lord Selkirk, and describes it.

Sir Montague Smith.—Was he not connected with the North-West Company?

Mr. McCarthy.—I think that either he or some one of his name was connected with the North-West Company.

Sir Montague Smith.—Was he the Chairman of the Hudson's Bay Company?

Mr. McCarthy.—Yes.

Mr. Mowat.—My friend referring to this places me at a great disadvantage. I have not had the opportunity of following this report.

The Lord Chancellor.—Probably you will be able to follow it as we go on.

Mr. McCarthy.—At page 340, or rather more strictly speaking, it is about page 341, question 5931, they speak of purchasing back from Lord Selkirk, and at question 5985, page 345, they speak of the price they paid. In the same statement which has been laid before this Committee, I observe an item of £84,111 paid to Lord Selkirk for the Red River settlement. I stated just now it was £100,000. I thought it was £100,000, but I find it is £84,000 odd. The answer is

"That is the money actually paid to Lord Selkirk with interest added to it. The honourable gentleman is aware that when merchants make a purchase they open an account

* Both Fort Frances and Rat Portage were outside the limits of Assiniboia.

† Before the amalgamation of the two Companies, he had been one of the partners of the North-West Company, of Montreal.

and they debit to that account the money which the estate cost them and they add the interest and deduct any revenue or receipts which they have had from it since, and the £84,000 is the balance of such an account."*

Then, in one of the appendices is a statement from Judge Johnson giving a report as to the Courts, and so on.

The LORD CHANCELLOR.—That has no direct bearing on the question.

Mr. MCCARTHY.—No; the only reason I am referring to it is for the statistical account of Red River Colony taken on the 20th and 24th May, 1856, and it is signed "T. G. Johnson, Governor of Assiniboia. William R. Smith, Secretary."

The LORD CHANCELLOR.—It is not in the appendices before us, and it has no bearing on the case.

Mr. MCCARTHY.—It speaks of the courts, the general quarterly courts, and the petty local courts, and gives the statistics and the number of causes tried, and so on.

The LORD CHANCELLOR.—That only goes to shew that there were some disputes in the courts.

Mr. MCCARTHY.—That is what it is I suppose. Now I will return to the Joint Appendix, and your Lordships will see the statement of the Hudson's Bay Company's Rights, pages 591 and 592,† and which summarizes what they claim to be their rights.

Sir MONTAGUE SMITH.—That is in 1850?

Mr. MCCARTHY.—That is in 1850, and it becomes very important as leading up to the Rupert's Land Act. It is more fully set out perhaps with all its details in this document addressed to the House of Commons which I have in my hands. It gives the Hudson's Bay Company's Statement of Rights, as submitted to the attorney and solicitor-generals. At page 616 is the opinion,‡ and that opinion cites all the documents that had reference to it, and amongst the documents is the map and plan of the Hudson's Bay claim which I have before me. The map was the foundation of the Rupert's Land Act, and which ended in

* In the index to this report appears the suggestion that the sum actually paid to Lord Selkirk was £25,000, which was probably the original principal sum.

† "Statement of the Rights as to Territory, Trade, Taxation and Government claimed and exercised by the Hudson's Bay Company on the continent of North America, 1850" (Joint App., 591; Sess. Paps. Can. 1857, No. 17). In this document the Company refer to an accompanying map as shewing their territorial claim, their exclusive rights of trade being also claimed to be co-extensive therewith. The claim is practically the same as that afterwards put forward in 1857, that is, to all the lands whose waters flow to Hudson's Bay.

‡ The opinion referred to is that of Sir Richard Bethell and Sir Henry S. Keating of July, 1857, and, so far as it relates to the subject of the boundaries, is as follows:

"The remaining subject for consideration is the question of the geographical extent of the territory granted by the charter, and whether its boundaries can in any and what manner be ascertained. In the case of grants of considerable age, such as this charter, when the words, as is often the case, are indefinite or ambiguous, the rule is, that they are construed by usage and enjoyment, including in these latter terms the assertion of ownership by the Company on important public occasions, such as the Treaties of Ryswick and Utrecht, and again in 1750.

"To these elements of consideration upon this question must be added to the enquiry (as suggested by the following words of the charter, viz.: "not possessed by the subjects of any other Christian Prince or State") whether, at the time of the charter, any part of the territory now claimed by the Hudson's Bay Company could have been rightfully claimed by the French, as falling within the boundaries of Canada or Nouvelle France, and also the effect of the Acts of Parliament passed in 1774 and 1791.

"Under these circumstances, we cannot but feel that the important question of the boundaries of the Hudson's Bay Company might with great utility, as between the Company and Canada, be made the subject of a *quasi* judicial enquiry.

"But this cannot be done except by the consent of both parties, namely, Canada and the Hudson's Bay Company: nor would the decision of a Committee of the Privy Council have any effect as a binding judicial determination. But if the Hudson's Bay Company agree to the proposal of the Chief Justice of Canada, that the question of the boundaries should be referred to the Privy Council, it being further understood by both parties that the determination of the Council shall be carried into effect by a declaratory Act of Parliament, we think the proceeding would be the best mode of determining that which is, or ought to be, the only real subject of controversy. * * * Counsel would be heard on behalf of Canada, and of the Company."

the annexation of it to the Dominion. Here it is annexed to the statement, and it was referred to the attorney and solicitor-generals with that statement of claim, and they gave their opinion that the claim of the Hudson's Bay Company was well founded.

Lord ABERDARE.—Yes; but that opinion also embodies some words which you cannot ignore. At page 618, line 20, there is this:

"In the case of grants of considerable age such as this Charter, when the words, as is often the case, are indefinite or ambiguous, the rule is that they are construed by usage and enjoyment, including in these latter terms the assertion of ownership by the Company on important public occasions such as the Treaties of Ryswick and Utrecht and again in 1750."

Sir ROBERT COLLIER.—The opinion they gave is that the important question of the boundaries might be the subject of a *quasi* judicial enquiry.

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—You conceded just now, did you not, that this map shewed that it was French territory?

Mr. MCCARTHY.—No.

The LORD CHANCELLOR.—You referred to it as the nearest post to Moose River.

Mr. MCCARTHY.—Yes; but I never conceded that it was French territory. What I endeavoured to state was that that was taken possession of as an act of war.

The LORD CHANCELLOR.—I thought that you conceded that it was French territory?

Mr. MCCARTHY.—No; the French never lost possession of it. It was one of those which they ought to have given up, but they never gave it up. It was taken possession of as an act of war.

The LORD CHANCELLOR.—Well, but with regard to this map at all events, whatever else appears about it, one thing is clear, that the coloured portion included the Hudson's Bay Company's territories.

Mr. MCCARTHY.—All the awarded territory is in there.

The LORD CHANCELLOR.—Apparently all the awarded territory is in there, as you say, and a good deal more.

Mr. MCCARTHY.—Yes; a good deal more to the west which is not disputed at all.* Will your Lordship kindly tell me whose opinion is attached to the House of Commons document that you have in your hand?

The LORD CHANCELLOR.—There is an opinion of Sir John Jervis and Sir John Romilly.

Mr. MCCARTHY.—That is the one I am looking for. I think it is with reference to the extent of the territory and the boundaries. It is on that map your Lordship sees that the opinion is given, and that is the extent of their claims.

Lord ABERDARE.—Is that opinion given in the Joint Appendix?

Mr. MCCARTHY.—It is, page 26. That is merely an extract. The Lord Chancellor has the opinion in full.

The LORD CHANCELLOR.—I do not see that this has any reference to the boundaries.

Mr. MCCARTHY.—If your Lordship will hand it to me I think I shall be able to find it for you.

* It was disputed by the Province of Ontario, which, by virtue as well of the French possession as of Acts of the Imperial Crown and Parliament respectively, claimed up to the north-westerly watershed and sources of the Saskatchewan.

The LORD CHANCELLOR.—The only words that refer to the boundaries of the company's territories are these, which occur in their Statement of Rights :

" Under this grant the company have always claimed and exercised dominion as absolute proprietors of the soil in the territories understood to be embraced by the terms of the grant, and which are more particularly defined in the accompanying map; and they have also claimed and enjoyed the exclusive right of trading in those territories."

That is all that is said.

Mr. MCCARTHY.—No; if your Lordship will look a little earlier you will see this: " We were honoured with your Lordship's commands."

The LORD CHANCELLOR.—I was referring to the statement.

Mr. MCCARTHY.—I was referring to the opinion.

The LORD CHANCELLOR.—Yes; the opinion proceeds on the statement and the papers sent. There was the passage which I mentioned just now, and there is nothing whatever bearing on any question of boundaries afterwards; and it looks to me as obvious as anything can be that it did not refer to the attorney and solicitor-generals the question of the extent of the rights and claims and boundaries.

Mr. MCCARTHY.—I think I can point it out to your Lordship, with deference.

The LORD CHANCELLOR.—The real question was whether they had or had not their charter rights, and it is with reference to that question only that the opinion was asked.

Sir R. COLLIER.—It is not a question about laying down the boundary line.

Mr. MCCARTHY.—Your Lordship will see this at page 26 :

" Mr. Hawes then stated that he was to enclose a copy of a letter from the Chairman of the Hudson's Bay Company, together with a statement and map, prepared under his direction, of the territories claimed by the company in virtue of the charter granted to them by King Charles the Second."

That is plain enough.

" Mr. Hawes also sent the copy of a letter, dated the 30th September last, from Mr. A. K. Isbister "—that is the gentleman who was opposing the Hudson's Bay Company— " enquiring in what mode Her Majesty's Government intend to give effect to the Resolution of the House of Commons, and whether in the event of any reference to a judicial tribunal, it will be necessary for the parties interested to appear by counsel or otherwise, or to furnish evidence, and if so, of what nature. Mr. Hawes concluded by stating that your Lordship requested that we would take these papers into our early consideration and inform you whether we are of opinion that the rights claimed by the company do properly belong to them."

I take it that it means the territories claimed.

The LORD CHANCELLOR.—No, it does not.

Mr. MCCARTHY.—If your Lordship will allow me to go on, I think you will see it does.

The LORD CHANCELLOR :

" Having regard to the powers in respect to territory, trade, taxation and government claimed by the Hudson's Bay Company."

That is what the Law Officers gave their opinion upon.

Mr. MCCARTHY.—Your Lordship sees it says :

" Mr. Hawes concluded by stating that your Lordship requested that we would take these papers into our early consideration, and inform you whether we are of opinion that the rights claimed by the Company do properly belong to them."

Accompanying that was a statement of the territories claimed. Now let me read the following :

"In the event of our entertaining a doubt on any point raised in these papers, Mr. Hawes was to request that we would advise your Lordship in what manner the opinion of a competent tribunal can be obtained on the subject.

"In obedience to your Lordship's command, we have taken these papers into our consideration."

Now, what are the papers ? The paper marking the territorial claim was one of them.

"We have taken these papers into our consideration and have the honour to report that, having regard to the powers in respect to territory, trade, taxation and government claimed by the Hudson's Bay Company, in the statements furnished to your Lordship by the chairman of that company, we are of opinion that the rights so claimed by the company do properly belong to them."

The LORD CHANCELLOR.—Did anybody ever hear that a court of justice was taken to express an opinion on that which was not before it ? And in the opinion of the Law Officers there is not a trace that the question of the extent of the rights, claims and boundaries was before them. There is a large general question whether they have or have not their charter rights.

Mr. MCCARTHY.—There is more than that.

The LORD CHANCELLOR.—The question of what the powers in respect of territory, trade, taxation and government were, the Attorney and Solicitor-Generals could form an opinion upon, and they had the means of doing that; but what means had they for judging of the extent of the boundaries ? There is nothing.

Mr. MCCARTHY.—They had the map. They had the limits of the watershed. At that date two questions were submitted to the Law Officers of the Crown for their opinion. 1st, Was the charter invalid ? Chief Justice Draper did not contend that, representing the people here.* And then, 2ndly, What were the limits up to a particular point ? Then the Law Officers' opinion was taken, and the company was asked to make a statement, and if your Lordships will pardon me for apparently persisting in this, it seems to me one of the questions submitted to the Law Officers was, not as to the trade merely, but as to the extent of territory, and that it was considered by them well founded.

The LORD CHANCELLOR.—I have no idea of any such question being submitted to the Law Officers. It seems to me perfectly clear that it was not.

Sir MONTAGUE SMITH.—Then, subsequently, the opinion of the Law Officers was taken as to whether these questions could be put into a separate enquiry, treating them entirely as in doubt, the Law Officers giving reasons for thinking they should be construed into a question of boundaries, and the Law Officers said that that question might be made the subject of a *quasi* judicial enquiry.

Mr. MCCARTHY.—Yes ; but Canada declined to do so. I began by saying that it was the opinion subsequently taken of the Law Officers. If it had been

*Counsel quite misapprehends the position of Chief Justice Draper on the question. This is made clear by the Chief Justice's communications, at the time, to the Secretary of State for the Colonies: "In the last interview with which you favoured me, I took occasion to advert to the question of boundary . . . as one which required to be settled as a necessary preliminary. Whether it would be desirable to sever this from the more general question of the legality and validity of the Charter, is a matter I should desire to leave for your consideration." "A careful perusal of it [the Charter] will suggest many doubts whether it be not altogether void. But . . . for the moment conceding that the indefinite description of the territory purporting to be granted does not vitiate the grant," etc. (Joint App. 193 ; App. to Report of Select Committee of the Imperial House of Commons on the H. B. Co., 1857, p. 374).

supposed that any opinion of the Law Officers had settled the matter, that would have been another thing.

The LORD CHANCELLOR.—If you really attend to what passed in 1849, it is really too clear for controversy. Mr. Isbister, in 1849, writes that an address to the Crown had been agreed to by the House of Commons, to institute an enquiry into the legality of certain powers claimed and exercised by the Hudson's Bay Company under their charter. Then, he asks how that enquiry is to be made. Mr. Hawes, the Under-Secretary, replies on the 22nd October:

"With reference to your letter requesting to be informed in what manner Her Majesty's Government propose to carry into effect the enquiry into the legality of certain powers claimed and exercised by the Hudson's Bay Company, I am directed by Earl Grey to acquaint you that the subject is at present under consideration."

Then what is sent to the Law Officers by the Colonial Secretary is the copy of the resolution of the House of Commons:

"That an address be presented to Her Majesty praying that measures be taken for ascertaining the legality of the powers which are claimed or exercised by the Hudson's Bay Company."

And he sends all the papers. The "rights claimed by the company" meant the right to exercise those powers, and there is nothing in the letter upon the subject of a dispute concerning boundaries. They send a copy of a resolution which shews what they claim, but as to there being a dispute as to boundaries, there is not the least trace of it.

Lord ABERDARE.—But how can that be assumed to have any weight in that controversy when you find what has been submitted to the consideration of the Law Officers?

Sir ROBERT COLLIER.—I can speak as an ex-Law Officer, and I say that it is perfectly absurd to suppose that the Law Officers would go into such a question.

The LORD CHANCELLOR.—Of course, if they had understood that the boundaries were involved, they would have sent the papers back.

Mr. MCCARTHY.—Of course, if your Lordships do not wish to hear me, I do not wish to be persistent, but as counsel here I represent the Province of Manitoba.

The LORD CHANCELLOR.—We shall be glad to hear your argument, of course.

Mr. MCCARTHY.—All I propose to do now is to read to your Lordships the letter from Governor Pelly.*

"That letter, viz., the letter from the Under-Secretary of State, has been handed to the directors of the Hudson's Bay Company, and in compliance with your request that they would render their assistance in complying with the address of the House of Commons by furnishing your Lordship with a statement of the rights to which the company consider themselves entitled, and the extent to which those rights are at present or have recently been exercised in relation to the several heads of enquiry specified in the resolution, I have the honour to forward to you a statement of the rights as to territory, trade, taxation and government claimed and exercised by the Hudson's Bay Company on the continent of North America, accompanied with a map of North America, on which the territories claimed by the Hudson's Bay Company, in virtue of the charter granted to them by King Charles the Second, are coloured green, the other British territories pink, and those of Russia yellow."

* Sir J. H. Pelly to Earl Grey, 13 September, 1849. (Papers relating to the legality of the powers . . . claimed or exercised by the Hudson's Bay Company . . . ordered by the House of Commons to be printed, 12th July, 1850, p. 3.) The map referred to in the letter is that of 1850, printed among the same papers, and shews the Company's territorial claim to be to all the lands whose waters flow to Hudson's Bay.

That was a pretty clear statement that they understood that they were to furnish a statement of their territory.

Sir MONTAGUE SMITH.—But the Law Officers were not considering the way in which that affected the boundary.

The LORD CHANCELLOR.—And the controversy as to whether they claimed the disputed land is another thing altogether.

Mr. MCCARTHY.—Your Lordships will see I think that it comes pretty much to that. I will refer to the Joint Appendix as shortly as possible, just to trace the history of this subject, shewing what they were claiming at all events, and I want to shew that it was perfectly well understood by the Ministers of Canada. At the Joint Appendix, page 168.*

Sir BARNES PEACOCK.—For what do you refer to page 168?

Mr. MCCARTHY.—That was for the opinion as to the geographical question. They did not give any opinion as to the boundaries at all. Then at page 273 there is a letter from the Duke of Buckingham (who was then Colonial Secretary) to the Governor-General.† He says:

"Her Majesty's Government will be willing to recommend a compliance with the prayer of the address so soon as they shall be empowered to do so with a just regard to the rights and interests of Her Majesty's subjects interested in those territories. They are advised, however, that the requisite powers of government and legislation cannot, consistently with the existing charter of the Hudson's Bay Company, be transferred to Canada, without an Act of Parliament. Before such an Act can be obtained, it is necessary to consider the position of the Hudson's Bay Company. The Company have held their charter, and exercised privileges conferred by it, for 200 years, including rights of government and legislation, together with the property of all the lands and precious metals, and various eminent law officers consulted in succession have all declared that the validity of this charter cannot be justly disputed by the Crown."

Then, at page 274, the Under-Secretary writes to the Deputy-Governor of the Hudson's Bay Company, under date 23rd April, 1868, that the Duke of Buckingham and Chandos—

"has had under his consideration the address from the parliament of Canada to Her Majesty, praying that Rupert's Land and the North-West Territory may be united with the Dominion of Canada and placed under the authority of the Canadian parliament, and the letter from the Governor of the Hudson's Bay Company, dated the 25th of January, on that subject. Her Majesty's government think that it will be right to comply under proper conditions with the wish expressed by the parliament of Canada, and they propose to introduce a Bill for the purpose into the Imperial parliament. They desire, however, to pay due regard to the interest of Her Majesty's subjects already concerned in the territory, and with that view they will be prepared to make provision for any reasonable terms which may be agreed upon with the Hudson's Bay Company. I am directed to call your attention to the negotiations which took place in 1864, between the Secretary of State and the company, as recorded in the correspondence referred to in the margin [setting out several letters], and I am to request that you will state what are the terms which the company would be prepared to accept, proceeding on the principles then adopted, namely, that the compensation should be derived from the future proceeds of the lands, and of any gold which may be discovered in Rupert's Land, coupled with reservations of defined portions of land to the company."

* The document appearing at that page is the Memorandum of the Canadian Commissioner of Crown Lands, 1857.

† It is dated 23rd April, 1868, and has reference to "a joint address from the Senate and House of Commons of Canada, praying the annexation to Canada of Rupert's Land and the North-West Territory." (Coms. Journals, Can., 1867-8, p. 367.)

Then at page 594 there is a letter from Mr. Goschen to the Secretary of State: "I have the honour to acknowledge your letters."

Sir ROBERT COLLIER.—We have had this letter.

Mr. MCCARTHY.—I beg your Lordship's pardon, that was not the letter I had intended to read. Now, if your Lordship goes back to look at the Act of Confederation, on page 433, section 6, there are two things which I take it are of importance on this Act.

Sir ROBERT COLLIER.—That is the British Columbia Act.

Mr. MCCARTHY.—No; the British North America Act. It is the Act of Confederation. I refer to the sixth section for this purpose. It may be important otherwise with reference to Lord Durham's commission:

"The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate provinces."

The question there is what weight is to be attached to the words "as it exists at the passing of this Act." Then, section 146 says:

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of Parliament of Canada, and from the Houses of the respective Legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act."

Provision is thus made for the inclusion of Rupert's Land. Then we come to the Rupert's Land Act, which is at page 545, and which has a very important bearing upon the question here. It says:

"Whereas by certain Letters Patent granted by His late Majesty King Charles the Second, in the twenty-second year of his reign, certain persons therein named were incorporated by the name of 'The Governor and Company of Adventurers of England, trading into Hudson's Bay,' and certain lands and territories, rights of government and other rights, privileges, liberties, franchises, powers and authorities were thereby granted or purported to be granted to the said Governor and Company in His Majesty's dominions in North America; And whereas by the British North America Act, 1867, it was (amongst other things) enacted that it should be lawful for Her Majesty, by and with the advice and consent of Her Majesty's Most Honourable Privy Council, on address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions as are in the address expressed and as Her Majesty thinks fit to approve, subject to the provisions of the said Act; And whereas for the purpose of carrying into effect the provisions of the said British North America Act, 1867, and of admitting Rupert's Land into the said Dominion as aforesaid, upon such terms as Her Majesty thinks fit to approve, it is expedient that the said lands, territories, rights, privileges, liberties, franchises, powers and authorities, so far as the same have been lawfully granted to the said Company should be surrendered to Her Majesty, Her heirs and successors, upon such terms and conditions as may be agreed upon by and between Her Majesty and the said Governor and Company, as hereinafter mentioned;

"Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

"1. This Act may be cited as The Rupert's Land Act, 1868.

"2. For the purposes of this Act, the term 'Rupert's Land' shall include the whole of the lands and territories, held, or claimed to be held, by the said Governor and Company."

Now, whether they were rightfully held or not, it is quite plain that having regard to the document which I produce, and which I will shew in a moment was communicated to Canada, they did claim to hold the watershed.*

The LORD CHANCELLOR.—I see the word "held" is included as well as the word "claimed."

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—Do you say that that would imply the title you claim?

Mr. MCCARTHY.—Yes: "for the purposes of the Act."

The LORD CHANCELLOR.—That raises an important question of construction. You will certainly have something to do to satisfy us that the merely putting territory in a map of this kind was sufficient to shew that it was meant to be transferred, although it was *de facto* held by the province.

Mr. MCCARTHY.—I would say, first, it was not *de facto* held by the province; then, I say it was *de facto* held by the Company; and, thirdly, I say, whether it was *de facto* held or not, it was claimed by the Company.* We must look and see what the object of it was. It was known when Canada was confederated, that so far as Ontario was concerned, it was taken in as it then was, and I will point out by and bye, that according to Lord Durham's commission it did not go farther than the height of land, if it went as far.

The LORD CHANCELLOR.—Lord Durham's commission, if I remember rightly, carried the Ontario Boundary beyond their blue land, [*referring to the colouring of the territory claimed by the Hudson's Bay Company, on the map produced by them to the House of Commons Committee, 1857*].

Mr. MCCARTHY.—I was speaking of the western part.

The LORD CHANCELLOR.—But it is important to know that.

Mr. MCCARTHY.—I understand that my friends, when addressing you on that point, contended that the true meaning of that was, not to the shore, but rather to the Hudson's Bay territory.†

The LORD CHANCELLOR.—No, that was an earlier document, which, if it stood by itself, perhaps would suggest that view, but Lord Durham's commission is expressly to the shore.‡ That is an extremely important point, and no doubt you will not overlook it.

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*The position of Ontario in regard to this contention was, that the second section of the Act should be construed as if it read: "For the purposes of this Act, the term 'Rupert's Land' shall include the whole of the lands and territories rightfully held, or rightfully claimed to be held, by the said Governor and Company." It is conceivable that the Company may have held some portions of territory *de facto*, but yet without colour of right, and that, as to other portions, they might have been rightfully entitled, and yet never have come into possession.

†There was no such contention. The very contrary was claimed on behalf of Ontario as well before the arbitrators as before their lordships.

‡Boundary description in Imperial Commission to John George, Earl of Durham, Captain-General and Governor-in-Chief of the Province of Upper Canada, 30th March, 1838. "Our said Province of Upper Canada; the said Province being bounded on the east by the line dividing that Province from Lower Canada, beginning at a stone boundary on the north bank of the Lake St. Francis, at the cove west of the Point au Baudet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit in the direction of north thirty-four degrees west to the westernmost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees east, until it strikes the Ottawas River, to ascend the said river into the Lake Temiscaming; the said Province of Upper Canada being also bounded by a line drawn due north from the head of the said lake until it reaches the shore of Hudson's Bay; the said Province of Upper Canada being bounded on the south, beginning at the said stone boundary between Lancaster and New Longueuil, by the Lake St. Francis, the River St. Lawrence, the Lake of the Thousand Islands, Lake Ontario, the River Niagara, which falls [leads] into Lake Erie, and along the middle of that lake; on the

Mr. McCarthy.—No, my Lord, I shall not. Now, I am going to contend, and I think your Lordship will at once accede to the reasonableness of my proposition, that it was a very important matter indeed for the welfare of the confederacy that Rupert's Land should be defined before it was transferred. Nothing could be more unfortunate than that a question of this kind should be permitted to arise, and I say that care was taken that for the purposes of the Act, and for the purposes of the transfer, Rupert's Land was defined. It was a well-known claim put forward by the Hudson's Bay Company. They claimed to go the height of land. Their claim was disputed, but what does parliament say? We say that parliament says, that for the purpose of this Act, which was to be the basis of the transfer to the Dominion, Rupert's Land must be defined. Now, how is it defined? For the purposes of this Act, whether it be Rupert's Land, or whether it be not Rupert's Land, all that the Hudson's Bay Company held, or all that the Hudson's Bay Company claimed, is Rupert's Land.

Sir Montague Smith.—This was a purchase in fact.

Mr. McCarthy.—That is one view, but if you like to hear my argument upon it, my Lord, I hope to be able to shew you that it has another bearing.

Sir Montague Smith.— But they would only purchase what was claimed.

Mr. McCarthy.—It was more than a purchase; it was a surrender to Her Majesty in the first place.

Sir Montague Smith.—It was a purchase by the colony; it was not made a separate colony.

Mr. McCarthy.—It was made a separate province.* The Dominion is made up of several provinces. Amongst the new provinces was Rupert's Land.*

The Lord Chancellor.—You are contending that the Act speaks of territory which was not at that time under the Dominion of Canada.

Mr. McCarthy.—What I submit, with all deference to your Lordship, is this. It was important when this new colony was to be brought into the Dominion that there should be no dispute as to boundaries. Canada at that time perfectly understood its position. Its attention was drawn to it, and although they have proceeded as though this Act had not been passed, still, upon the whole, they

west by the channel of Detroit, Lake St. Clair, up the River St. Clair, Lake Huron, the west shore of Drummond Island; that of St. Joseph and Sugar Island, thence into Lake Superior."

His commission as Captain-General and Governor-in-Chief of Lower Canada, of the same date, also described the inter-provincial line as drawn to "the shore of Hudson's Bay," as do all the commissions thereafter, whether of Upper or Lower Canada, or of the Province of Canada, up to and inclusive of that to the Earl of Elgin in 1846, after which the commissions contain no boundary descriptions whatever. (See *ante*, p. 130, note).*

As to the description of the south-westerly boundary line having been drawn no farther than "into Lake Superior," the true reason was that the commissioners appointed under the Treaty of Ghent, 1814, to designate the international boundary through the various rivers, lakes and water communications, had agreed upon a line extending only "into Lake Superior . . . to a point," etc., "and had disagreed as to the course from the point last mentioned . . to another point . . in Lac la Pluie" [Rainy Lake]. (See the report of the commissioners, in Hertslet's Treaties, vol. 13, p. 892.) This disagreement had not, at the time of issuing the commission to the Earl of Durham, been settled. (Further particulars in the Ontario Boundary Papers, 1882, p. 294, note.)

* These contentions of counsel are not sustained by the British North America Act, 1867, Sect. 146, which, treating of the admission into the Union of those portions of British North America not yet included in it, refers in terms, to Newfoundland, Prince Edward Island and British Columbia as "colonies, or provinces," but not so to Rupert's Land, which, on the contrary, it classifies with the North-Western Territory: "Rupert's Land and the North-Western Territory, or either of them," and the Dominion treated the two combined as a mere territory, subject entirely to the disposition of the Dominion Parliament. In none of the official acts and documents relating to its admission, or then prospective admission, into the Union is Rupert's Land referred to as a colony; but it is frequently referred to as a territory. In the Act, 32 and 33 Vict., cap. 3 (Dom.), Rupert's Land and the North-Western Territory are referred to as "territories," and the title of the two conjointly, is enacted to be "the North-West Territories." Sec. 1 is as follows: "The said territories when admitted as aforesaid, shall be styled and known as "the North-West Territories." The Act, 33 Vict., cap. 3 (Dom.), applies the term "territories" in the same way, and the Imp. Act, 34 and 35 Vict., cap. 28, which *inter al.* confirms the said Acts of the Dominion, impliedly uses the term also in the same way.

accepted it. Are we to suppose that Parliament would throw this as a bone of contention into Canada without saying: We will define the boundaries, and we will define them just as the Hudson's Bay Company has laid them down and claimed; it will not hurt Canada, and they will go into Canada whichever way it is.

Sir BARNES PEACOCK.—When you speak of Canada, do you speak of Ontario?

Mr. MCCARTHY.—No; Ontario was bound by it.

LORD ABERDARE.—I was going to ask that. Had Canada then power to bind Ontario?

Mr. MCCARTHY.—Yes, we submit in fact they had. Canada was composed of representatives of the whole of the Dominion, including Ontario. There was not any protest on the part of Ontario; they never objected to it; they never entered a protest of any kind whatever.

Sir BARNES PEACOCK.—This was addressed to the two Houses of Parliament, not of Ontario, and therefore Ontario was not necessarily bound by it, except it was legislation and it takes away their rights.

Mr. MCCARTHY.—It has the force of legislation in this sense. The petition addressed to the two Houses asks that this colony shall be transferred. Now, what was the colony? Surely it was for the British Imperial Parliament to say what the colony was, and they did declare what the colony was. It is a colony within the limits described by that map, about which there can be no dispute.* On page 445 your Lordship will see in the Rupert's Land Act this passage:

"3. It shall be competent for the said Governor and Company to surrender to Her Majesty, and for Her Majesty, by any instrument under her sign manual and signet, to accept a surrender of all or any of the lands, territories, rights, privileges, liberties, franchises, powers and authorities whatsoever granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land, upon such terms and conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company."

Sir BARNES PEACOCK.—That says "Rupert's Land."

Mr. MCCARTHY.—Yes, but Rupert's Land for the purposes of this Act means all that they claim.† And it goes on:

"Provided, however, that such surrender shall not be accepted by Her Majesty until the terms and conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an address to Her Majesty from both the Houses of Parliament of Canada, in pursuance of the one hundred and forty-sixth section of the British North America Act, 1867; and that the said surrender and acceptance thereof shall be null and void, unless, within a month from the date of such acceptance, Her Majesty does, by Order in Council, under the provisions of the said last recited Act, admit Rupert's Land into the said Dominion. Provided further that no charge shall be imposed by such terms upon the consolidated fund of the United Kingdom.

"4. Upon the acceptance by Her Majesty of such surrender, all rights of government and proprietary rights, and all other privileges, liberties, franchises, powers, and authorities whatsoever, granted or purported to be granted by the said letters patent to the said Governor and Company within Rupert's Land, and which shall have been so surrendered, shall be absolutely extinguished; provided that nothing herein shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere trade and commerce.

* It was disputed by Ontario.

† All that they *rightfully* claim. See *ante*, p. 308, note *.

"5. It shall be competent to Her Majesty by any Order or Orders in Council as aforesaid, on address from the Houses of the Parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada, and thereupon it shall be lawful for the Parliament of Canada, from the date aforesaid, to make, ordain and establish within the land and territory so admitted as aforesaid all such laws, institutions and ordinances, and to constitute such courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein; provided that until otherwise enacted by the said Parliament of Canada all the powers, authorities and jurisdiction of the several courts of justice now established in Rupert's Land, and of the several officers thereof, and of all magistrates and justices now acting within the said limits, shall continue in full force and effect therein."

Now, if your Lordship will allow me, I will refer to the first address at this stage, which is to be found at page 266 of the Joint Appendix.* This is the one passed immediately after Confederation, and it is important upon this part of the case. Having recited the 146th section, to which I have referred, they say:

"We do therefore most humbly pray that Your Majesty will be most graciously pleased, by and with the advice of Your Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to Your Majesty that we are willing to assume the duties and obligations of government and legislation as regards these territories."

That was the earlier address, that gave rise to the correspondence which passed between the governments at great length, and which culminated in the further legislation to which I am about to refer. Now at page 275.

Sir ROBERT COLLIER.—We do not require that correspondence.

Mr. MCCARTHY.—No, my Lord, I am not going to give you more than is absolutely necessary, at least so far as I can understand it.

Sir ROBERT COLLIER.—What page are you now on?

Mr. MCCARTHY.—275.

Sir ROBERT COLLIER.—That is the second address?

Mr. MCCARTHY.—No, it is a "Memorandum of Sir George E. Cartier and the Honourable William McDougall, Canadian Delegates to England." It is dated the 1st October, 1868, and the Rupert's Land Act (to which it refers apparently) had been passed just before.

Sir MONTAGUE SMITH.—The Act puts Rupert's Land, as regards getting into the Dominion, on the same footing as the North-West Territory. It was first to form part of the Dominion. On the purchase, when Rupert's Land Act passed, it formed a part of the Dominion. Then subsequently it came to be entered as a province.

Mr. MCCARTHY.—Oh, no, you will see that the Dominion is made up of provinces. Then there is a provision made for taking in the organized provinces, such as British Columbia, and so on.

Sir MONTAGUE SMITH.—What became of the North-Western Territory?

Mr. MCCARTHY.—That was also brought in as a separate province.

Sir MONTAGUE SMITH.—But still it was brought in.

* Address to Her Majesty from the Senate and House of Commons of Canada, 16-17 December, 1867. (Journal Coms., Can., 1867-8, pp. 56-7.)

Mr. McCarthy.—Of course it belonged to the Imperial Government; it was not a part of Canada.*

Sir Montague Smith.—It was a part of the Dominion.

Mr. McCarthy.—Oh, no, the Dominion was at first limited to the original five Provinces. Then all that great country up here [*describing on the map*] was either in Rupert's Land or the North-Western Territory. Then provision was made for bringing in Rupert's Land and the North-Western Territory, at a subsequent date, upon petitions from both Houses, but when they were brought in they would come in as independent provinces.† Then they would have to be organized, of course under Dominion powers, and provision was made for that.

What I draw your Lordships' attention to particularly now is this minute of Sir George Cartier and the Honourable William McDougall, saying:

"We have the honour to acknowledge communication of a Minute of Council of this day's date, appointing us a delegation to England to arrange with the Imperial Government the terms upon which Canada may acquire Rupert's Land, and to state that we have much pleasure in accepting the mission. We would, however, beg to call the attention of the Committee to the terms of the recent Act of the Imperial Parliament 'to enable Her Majesty to accept a surrender, upon terms, of the lands, privileges and rights" of the Hudson's Bay Company, which declares that Rupert's Land, for the purposes of that Act, 'shall include the whole of the lands and territories held or claimed to be held' by the Company."

Shewing that their attention was directed to it:

"We would also call the attention of the Committee to the terms of the British North America Act, which provides for the admission of Rupert's Land and the North-West Territory, or either of them, into the Union. We respectfully recommend that we be authorized to arrange with the Imperial Government for the admission of the North-West Territory into union with Canada, either with or without Rupert's Land, as may be found practicable and expedient."

Then, there is the Report of the Committee of the Council upon that. They recite the authority, they recite the very words of the Act, which is all important as your Lordship will see, because it was not done without their notice and knowledge. Here they say: We are disputing what the Hudson's Bay Company claim, and the Imperial Parliament have stated that for the purposes of the Act the land which is transferred to it has been defined, and they draw special attention to that; and the Report of the Committee of the Council quite comprehends the point.

The Lord Chancellor.—I do not quite follow these documents. I see here no evidence of any dispute.

Mr. McCarthy.—But it shews they understood that the Rupert's Land Act had this wide definition.

The Lord Chancellor.—If it is to shew that these words were in the Act, I do not see how it is material, because that is beyond all question. Can you say more than that?

Mr. McCarthy.—But it shews that they knew their meaning and apprehended their force.

* Legally, the North-Western Territory was composed of such lands of British North America, outside of the colonies or provinces of Newfoundland, Nova Scotia, Prince Edward Island and British Columbia, as formed no part of Canada or of the territories of the Hudson's Bay Company. But its limits had never been defined, and this gave occasion to the Dominion, after this territory and the territory of Rupert's Land had been brought into the Union, to wrongfully claim, as being comprehended in the one or the other, extensive regions claimed by Ontario to have been within the undoubted limits of Upper Canada, and to be now within Ontario.

† They were to come in, not as Provinces, but as unorganized territory. See *ante*, p. 309, note *.

The LORD CHANCELLOR.—That does not seem to advance you a step. We know that the words are there, and of course they must be presumed to know what the effect of them was.

Mr. MCCARTHY.—I am sorry if your Lordship thinks it unnecessary, but it does appear to me important as shewing that Cana la perfectly understood what she was doing.

The LORD CHANCELLOR.—How could Canada be ignorant of it?

Sir ROBERT COLLIER.—You are occupying our time then by shewing that Canada understood the effect of the words in the Act. Of course they must be taken to have done so.

The LORD CHANCELLOR.—I do not see how it is of the least importance.

Sir MONTAGUE SMITH.—The Act of 1871 makes provision for the Parliament of Canada establishing "new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof."

Mr. MCCARTHY.—There may be territories not in the province.

Sir MONTAGUE SMITH.—Territories within the Dominion, not in the chaotic state which has been mentioned.

Mr. MCCARTHY.—That is so.

Sir MONTAGUE SMITH.—That is what I was saying just now. I thought you corrected me, and said that could not be, and that what was not in the Dominion was to be formed into a province.

Mr. MCCARTHY.—No my Lord, not in the Dominion originally.

Sir MONTAGUE SMITH.—That I am quite aware of. They seem to have put these territories, the North-Western Territory and Rupert's Territory, into the Crown first, and then into the Dominion, and then it was afterwards carved into provinces.

Mr. MCCARTHY.—Portions of them sliced into provinces.

Sir MONTAGUE SMITH.—That is what I meant.

Mr. MCCARTHY.—I thought your Lordship meant that Canada included that country at that time.

Then I was going on to refer your Lordship to page 221 of the Joint Appendix.

The LORD CHANCELLOR.—Is there any authentic map which shews Upper and Lower Canada, and Upper Canada as divided into counties and districts under the Act of 1798? *

Mr. MCCARTHY.—Yes, there are numbers of them, but unfortunately, my Lords, none of us have a copy with us.

The LORD CHANCELLOR.—It is rather to be regretted, because if one saw a map of the description we have before us, and then a map of that kind, it would be useful.

Mr. MCCARTHY.—I dare say it might be found at the Royal Geographical Society. We will look for it.

Lord ABERDARE.—They have them all collected there for examination by any one who may wish to consult them.

The LORD CHANCELLOR.—There is an Act passed in 1798 which divided

* 38 Geo. 3, c. 5 (Upper Canada)—"An Act for the better division of this Province." The last preceding division was under the Proclamation of Lieutenant-Governor Simcoe of 1792, (printed *ante*, p. 128). Both the Act and the Proclamation are discussed *ante*, pp. 128-130.

Upper Canada into a number of territories and districts, and attention has already been directed to the 40th section of the Act, which says :

"That the Counties of Essex and Kent, together with so much of this Province as is not included within any other District thereof, do constitute and form the Western District."

That would lead one to expect that the Counties of Essex and Kent were the last defined counties to the west, but that west of them there was an indefinite district which was not included in the counties, or in any other than the Western District, and it is hardly probable that that would have included the northern part adjoining Hudson's Bay.*

Mr. McCarthy.—I think I am correct—my learned friend will say I am not, if he differs—that all the claim made under the Act was that it took in to the height of land.

Mr. Mowat.—I do not agree to that at all.

The Lord Chancellor.—It is not to be assumed that your opponent would agree to that at all. But what we should like to see is some authentic map of some subsequent date showing what these counties are.

Mr. McCarthy.—By to-morrow morning we will try and furnish your Lordships with that.

The Lord Chancellor.—What is not within Upper Canada, you would say is not in Ontario ?

Mr. McCarthy.—Yes. Your Lordship will remember the time of the Lord Selkirk trouble. He objected to be tried for offences committed at Fort William, claiming that the due north line was the boundary, and the answer made by the authorities was that up to that point Upper Canada had been in the habit of exercising criminal jurisdiction.

The Lord Chancellor.—But that would be clearly within the Western District under this Act, through not within any county. But what strikes me as of importance is to know whether those counties included anything north up to James' Bay.

Mr. McCarthy.—I think there is a map in existence in London which would shew that was not so.

The Lord Chancellor.—One would like to see that.

Mr. McCarthy.—Yes, my Lord.† Then, as to the question of boundary being an important one, I would direct your attention to page 221. Your Lordships will remember, in 1857, the claim of the Hudson's Bay Company was clearly defined, and put forward in the presence of Chief Justice Draper, who attended on behalf of Canada. This is a letter from the Under-Secretary to the Governor of the Hudson's Bay Company,‡ and I ask your Lordships' attention to the latter part of the 4th paragraph, at line 35 :

* Ontario claimed that it unquestionably did, and, among a mass of other evidence in support, pointed to the proclamation of 1792, referred to in the preceding note, which declares that the County of Kent "is to comprehend all the country, not being territories of the Indians, not already included in the several counties hereinbefore described, extending northward to the boundary line of Hudson's Bay, including all the territories to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada." By the Act, the County of Kent was confined within narrower limits, but the other larger territories, "extending northward to the boundary line of Hudson's Bay," which formerly formed part of it, were included in the unorganized part of the Western District. The expression "boundary line of Hudson's Bay" here used, has been judicially decided to be synonymous, for the purposes of this case, with "shore of Hudson's Bay."

† No such map was, at any time, produced to their Lordships.

‡ Dated, 20th January, 1858. Sess. Paps. Can., 1858, No. 3.

"I am further to state that Her Majesty's Government consider it very desirable to ascertain by the decision of some competent authority the boundary between the Province of Canada and the territories claimed by the Company under their charter."

Then, the Company acquiesce in that, by their letter at page 223, 21st January, 1858.* That was communicated to Canada by the letter of the 22nd January, 1858, on page 224† where Mr. Labouchere says:

"I do not propose to discuss the question of the validity of the claims of the Company in virtue of their charter over the whole territory known as Rupert's Land. Her Majesty's Government have come to the conclusion that it would be impossible for them to institute proceedings with a view to raise this question before a legal tribunal without departing from those principles of equity by which their conduct ought to be guided. If therefore it is to be raised at all it must be by other parties on their own responsibility."‡

Sir MONTAGUE SMITH.—What do you cite that for?

Mr. MCCARTHY.—To shew that the question of the boundary was an important question between them at that time.

Sir ROBERT COLLIER.—Nobody would deny that.

Mr. MCCARTHY.—Perhaps it would be quicker to read it than for me to state it and have to prove it afterwards. Then, following that, Canada was asked to assume the responsibility of contesting this boundary, and at page 225 the address of the Canadian Parliament is to be found.§

"That the settlement of the boundary line is immediately required and that therefore we humbly pray Your Majesty that the subject thereof may be forthwith submitted for the opinion of the Judicial Committee of Your Majesty's Privy Council but without restriction as to any question Canada may deem it proper to present on the validity of the said charter, or for the maintenance of her rights."

Canada threw it back on the Imperial authorities and said, we think the Imperial authorities should do this. And finally, to bring this part of the statement to an end, the Imperial authorities said, no, if it is to be done at all it must be done by Canada and not England; so that up to 1858 all parties were agreed on this, that the boundary should be defined, and I read that as confirmatory of the view I put forward, that in point of fact the Rupert's Land Act did define these boundaries.

Sir MONTAGUE SMITH.—Nothing can be more vague than what is "claimed to be," and the expression "granted or purported to be granted."

Mr. MCCARTHY.—What is "claimed to be" is pretty plain, because they put it on that map, and define it as the water limits.

Sir BARNES PEACOCK.—Was not that to bind the Hudson's Bay Company, that all they possessed and all they claimed to possess was to pass to the Canadian Government for £300,000?

Mr. MCCARTHY.—Undoubtedly, there was the twofold object; first, to get rid of all possible claims, and, secondly, to define, for the purposes of the company, what was Rupert's Land?

* Sess. Paps. Can., 1858, No. 3.

† The Secretary of State for the Colonies to the Governor-General. *Ibid.*

‡ The succeeding paragraph of the despatch relates to the question of boundary, as follows:—"With regard to the question of boundary, as distinguished from that of the validity of the charter, Her Majesty's Government are anxious to afford every facility towards its solution, a mode of accomplishing which is indicated in the correspondence, if such should be the desire of Canada."

§ Address of the Canadian Parliament to Her Majesty, 13th August, 1858, Journals Leg. Ass. Can. 1858, p. 1028.

Sir MONTAGUE SMITH.—Whatever they "claim," rightfully or wrongfully.

Sir BARNES PEACOCK.—They were to have no claim again, excepting what they reserved to themselves by their surrender.

Mr. MCCARTHY.—That was one object of the Act, I admit. One was to empower the Queen to accept it; the other was to define the boundary, because we will follow that up by the next Address.

Sir ROBERT COLLIER.—We have had the terms of the Act before us several times.

The LORD CHANCELLOR.—You say that the boundary is settled by saying everything they claim.

Lord ABERDARE.—Did they put in as part of their claim all the territory to the east of the line marked here that goes up to James' Bay?

Mr. MCCARTHY.—Yes, they disregarded that altogether. They put in all the watershed of Hudson's Bay eastward as well as westward, all that is coloured green [*pointing to the map, shewing the company's claim, attached to the Report of the House of Commons Committee of 1857*].

Now, my Lords, we come to the deed, which is the next thing in point of order.

The LORD CHANCELLOR.—We really do not want anything in point of order to be gone through. The deed, if I remember right, simply transfers everything which the Hudson's Bay Company had to transfer.

Mr. MCCARTHY.—And is defined by metes and bounds.

The LORD CHANCELLOR.—Where is that deed? If the metes and bounds are there, they may be worth looking at.

Mr. MCCARTHY.—That is at page 315.* At page 316, line 20, they recite:

"And whereas by the Rupert's Land Act, 1868, it is enacted (amongst other things) that for the purposes of that Act, the term "Rupert's Land" shall include the whole of the lands and territories held, or claimed to be held, by the said Governor and Company, and that it shall be competent for the said Governor and the Company to surrender,"

and so on. Then that—

"The Canadian Government shall pay to the Company the sum of £300,000 sterling."

Then:

"The Company to retain all the posts or stations now actually possessed and occupied by them, or their officers or agents."†

Then the sizes of the blocks are given and so on. Then, at page 318:

"Now know ye, and these presents witness, that in pursuance of the powers and provisions of the Rupert's Land Act, 1868, and on the terms and conditions aforesaid, and also on condition of this surrender being accepted pursuant to the provisions of that Act, the said Governor and Company do hereby surrender to the Queen's Most Gracious Majesty, all the rights of government, and other rights, privileges, liberties, franchises, powers and authorities, granted, or purported to be granted, to the said Governor and Company by the said recited letters patent of His late Majesty King Charles the Second."

The LORD CHANCELLOR.—It is everything they had. There are no bounding words there.

*Deed of surrender of Rupert's Land, 19th November, 1869, the Governor and Company of Adventurers of England trading into Hudson's Bay, to Her Majesty. Prefix to Stats., Can., 1873, p. lxxvii.

† The sentence continues: "whether in Rupert's Land or any other part of British North America," etc.

Mr. McCarthy.—Except by the recital. The whole deed must be read together, I submit.

Sir Montague Smith.—The recital does not carry it further than the Act itself.

Mr. McCarthy.—Of course not. I do not say that it does; but I say it does carry it to that extent. Then the reservations define the deed in that regard very plainly. Your Lordships will find them in the schedule referred to, and there is this English River.

Sir Barnes Peacock.—That refers to section 2 of the surrender, at page 317. The company are to retain all the posts.

Mr. McCarthy.—Yes, that is referred to in the schedule, and on page 319; several of these posts are in the Rainy Lake district.

The Lord Chancellor.—We have already seen that there were posts within the undoubted limits of Canada which belonged to them.

Sir Robert Collier.—We have had all this before us.

Mr. McCarthy.—Then at page 310, and from that up to page 312, your Lordships will see the Report of the Canadian Delegates,* and the Joint Resolutions of both Houses.† I submit it is impossible to read these without seeing that what they did take over was what was called Rupert's Land in the Rupert's Land Act, and if I am right in saying that that was all they claimed, and they did claim at that time all that was coloured green [*referring to the same map, attached to the Report of 1857,*] it does appear to me that there is an end of the question as far as the height of land is concerned.

Sir Barnes Peacock.—They could not claim against the Canadian Government after that had been sold anything included in that deed.

Mr. McCarthy.—Undoubtedly, but I think it goes further.

Sir Barnes Peacock.—But it did not bind Ontario that they claimed they were entitled to all that was in the deed, whether that was included in the Ontario boundary or not.

Mr. McCarthy.—If the Imperial Act could bind Ontario, as I submit it does, then I think it does have that effect.

Sir Barnes Peacock.—How does the Imperial Act bind Ontario, supposing any part of the green is within the boundary of the Province of Ontario?

Mr. McCarthy.—In the first place, that was disputed territory. Then, the Imperial Act enacts that, for the purpose of the Act, this disputed territory is to be within Rupert's Land. That was a thing perfectly competent for the Imperial Parliament to do.

Sir Barnes Peacock.—They only say the words "Rupert's Land," were to include all that territory in the possession, or claimed to be in the possession of the Hudson's Bay Company. Then they authorize them to sell and dispose of, or surrender that, in consideration of £300,000.

Mr. McCarthy.—Yes. Then what I say is this, that this being disputed territory at the time, it was competent for the Imperial Parliament to enact: "We will settle this dispute and say all that is claimed by the Hudson's Bay Company shall be Rupert's Land."

Sir Barnes Peacock.—Did they say that?

Mr. McCarthy.—They do say so.

Sir Montague Smith.—They do not profess to settle a dispute.

* Report of the Canadian delegates, Messrs. Cartier and McDougall, to the Governor-General, 8th May, 1869. Sess. Paps. Can., 1869, No. 25.

† Resolutions of the Senate and House of Commons of Canada, 23th May, 1869. *Ibid.*

Sir BARNES PEACOCK.—They only say the term "Rupert's Land" is not only to include Rupert's Land, but all the North-West Territories.

Mr. MCCARTHY.—But what the Canadian Parliament ought to have transferred to them as Rupert's Land is defined by this Act. I humbly submit that that is very clear. Here there is a dispute from 1850 upwards.

Sir MONTAGUE SMITH.—Whatever the government purchased under that Act is to become part of the Dominion, and, upon an Address, may be formed into a province.

Mr. MCCARTHY.—Yes. Your Lordships will allow me to repeat once more the dates and history of it.

Sir MONTAGUE SMITH.—There is no intention recited to settle boundaries.

Mr. MCCARTHY.—Your Lordships will see, in 1857 the Hudson's Bay Company put forward this claim. All parties agreed that it was most important to settle the boundaries. The Canadian people were asked to appeal to this Board to settle boundaries. They declined to do so,* and then the Act of Parliament says it being important to settle it, we settle it for the purpose of this transfer of all the Hudson's Bay Company's claims.

Sir ROBERT COLLIER.—I think we all understand that.

Mr. MCCARTHY.—Then your Lordships find at page 312, the Resolutions of both Houses.

Sir ROBERT COLLIER.—They are in the terms of the Act.

Mr. MCCARTHY.—Yes. I will read the last part:

"That the Senate will be ready to concur with the House of Commons in an address to Her Majesty, that she will be graciously pleased, by and with the advice of Her Most Honourable Privy Council, under the 146th clause of the British North America Act, 1867, and the provisions of the Imperial Act, 31 and 32 Victoria, cap. 105, to unite Rupert's Land, on the terms and conditions expressed in the foregoing Resolutions, and also to unite the North-Western Territory, with the Dominion of Canada, as prayed for by, and on the terms and conditions contained in, the joint address of the Senate and the House of Commons of Canada adopted during the first session of the first parliament of Canada."

That brings that part of my argument to a close, and my submission on that is that it is clear at all events that the Rupert's Land territory did go up to the height of land.

Now, during the discussion, something was said by Lord Aberdare about the Commissions, and the importance of the North-West Angle† as bearing upon that point. I am not going to discuss—because my learned friend who follows me will do that—the effect of those commissions. I am merely going to trace their history, and see in what way they have any bearing upon the present question now in dispute. Now, the first commission, as your Lordships will remember, was to Sir Guy Carleton, and is to be found at page 375.‡ It is the commission that immediately followed the Quebec Act, and I am assuming, for the greater part of my argument, that that commission correctly represents—"northward

* But they urged that the Imperial Government should do so, and that the question of the validity of the charter should be disposed of at the same time, with the right to Canada to appear by counsel upon the proceedings. In the end, on the initiative of the Imperial Government, the whole question was settled on the basis of a compromise.

† "The most north-western point" is the description used in the commission, as well as in the treaties of 1783 and 1842. It is marked on the official map of the Boundary Commissioners, and its latitude and longitude are fixed by the latter treaty. "The North-West Angle" is a different locality, well known as a landing place on the old Dawson route, and as the place where the Indian Treaty No. 3 was negotiated.

‡ Printed *ante*, p. 40, note.

along the eastern bank of the said river to the southern boundary of the territory granted to the Merchants Adventurers"—the purport of the Act.

The LORD CHANCELLOR.—Along the bank of the Mississippi.

Mr. MCCARTHY.—I say that that correctly represents, for the purpose of my argument, the purport of the Act. I am coming to the north-west angle,* to see how that became an important point.

The LORD CHANCELLOR.—This is the commission of 1774.

Mr. MCCARTHY.—Yes; then the next commission is 1786, and that is after the cession to the United States, and that is at page 387.†

The LORD CHANCELLOR.—That brings us to the Lake of the Woods.

Mr. MCCARTHY.—Yes, for the first time. In the first place, if I may read the commission, your Lordships will see that in effect it follows the earlier commission, omitting the territory ceded to the United States. That is the effect of it, if your Lordships will look at the map. The earlier commission was based on the theory, and so was the Act, that the River Mississippi went further to the north than it does as a matter of fact. Then this commission traces up by the United States boundaries to the north-west angle,* and then goes westward to the Mississippi, and then northward to the Hudson's Bay territory, or the height of land.‡ The only difference between the two is this, that whereas the first commission said "along the eastern bank of the Mississippi to the . . . . territory granted to the Merchants Adventurers," this goes to the Mississippi, and then northward, carrying out the exact language of the Act of 1774. Instead of saying: and then along the Mississippi to the height of land,‡ it goes to the Mississippi and then northward to the height of land.‡ That is the only difference between the words of the two commissions, but it advances the argument no further than the one I have mentioned.

The LORD CHANCELLOR.—I do not the least follow you. The difference is, that the United States having now had ceded to it some of the territory that was formerly Canada, this boundary is drawn through Lake Superior to Long Lake. That is close to the south-eastern boundary of the disputed territory. Then it goes on: "Thence through the middle of the Long Lake and the water communication between it"—which seems to have been assumed erroneously, if I rightly understand the fact—"and the Lake of the Woods to the said Lake of the Woods." That goes substantially along the present boundary of the disputed territory.

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—And then it goes on, "Thence through the said lake to the most north-western point thereof."

Mr. MCCARTHY.—Now comes the difference.

The LORD CHANCELLOR.—Then it was supposed that proceeding further, on a due west course, you would get to the River Mississippi, and then, having got to that, you would go northward to the southern boundary of the Hudson's Bay territory.

Mr. MCCARTHY.—May I point out the difference there. The first commission says, "northward along the eastern bank of the said river to the southern boundary of the territory granted to the Merchants Adventurers," whereas this says to the "Mississippi, and northward."

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* See *ante*, page 318, note †.

† Printed *ante*, p. 44, note. Governor Haldimand's commission of 18th September, 1777, intervened. The boundary description was in the same terms as that contained in the Commission of 1774.

‡ There is no mention of the height of land in either Commission.

Lord ABERDARE.—There is something before that.

The LORD CHANCELLOR.—The difference is this: the first description is intended to include, up to the banks of the Mississippi, territory which was afterwards ceded to the United States.

Mr. MCCARTHY.—I have not made myself plain to your Lordship—It is only in the last few words that the difference occurs. I will point out on the map what I mean. The first descriptions goes to the banks of the Mississippi, and it follows that by express terms along the east bank of the Mississippi until the Hudson's Bay territory be reached. That is the first description,—that of 1774. The second description says: going from the north-west angle * to the Mississippi, but it does not say, "and then along the east bank of the Mississippi," but it says, "and northward," just introducing the words of the Quebec Act.† That is the only difference.

The LORD CHANCELLOR.—The difference relates to an imaginary prolongation of the Mississippi. The other description is capable of being followed up to its source, wherever that may be.

Mr. MCCARTHY.—The one description says, in terms, "along the bank." The other description, although it says to the Mississippi, says to the Mississippi and then "northward." †

The LORD CHANCELLOR.—The importance of this description is that it deals with the whole of the southern boundary of the now disputed territory. It takes you up to the north-west angle* of the Lake of the Woods—and so on.

Mr. MCCARTHY.—Yes. Then the treaty is to be found at page 533.‡ It is the treaty of cession to the United States, and an acknowledgment of their independence, and that is the next paper to be looked at to understand, if we can understand, why the north-west angle* was used.

The LORD CHANCELLOR.—I suppose you admit that this description takes in some part of the disputed territory, up to the Lake of the Woods?

Mr. MCCARTHY.—No, my Lord. I am going to explain what our contention is with reference to these words. Your Lordships see it follows the boundary given to the United States. That is page 533: "His Britannic Majesty acknowledges the said United States"—naming them—"to be free sovereign and independent states," and that he treats with them as such. Then the 2nd article is:

"And that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared that the following are and shall be the boundaries."

Then I need not read the earlier part of it, but if your Lordships will look at page 534:

"Thence through Lake Superior, northward of the Isles Royal and Philipeaux to the Long Lake; thence through the middle of said Long Lake, and the water communication

* The north-west angle,"—see *ante*, p. 318, note †.

†The contention of Ontario as to the word "northward" in the Quebec Act, and, by analogy, in this commission of 1786, was that it had reference, not to the prolongation of a line, but to the extension, in that direction, of the territory. See *ante*, pp. 184. note, 186, note†; also, p. 42, note. But Ontario also claimed that the commission conclusively disposed of the theory of the due north line from the junction of the Ohio and Mississippi, by shewing that, in the mind of the Crown—of the King in Council, and his Law Officers—the territory of the Province of Quebec extended along, and abutted upon, the supposed Mississippi of that day, to a point at least as far north as the latitude of the most north-westernmost point of the Lake of the Woods, to which point the southerly boundary of Quebec was carried by the commission in question: "Through the middle of the said Long Lake and the water communication between it and the Lake of the Woods to the said Lake of the Woods; thence through the said lake to the most north-western point thereof; and from thence, on a due west course, to the River Mississippi."

‡ Printed *ante*, p. 43, note.

between it and the Lake of the Woods, to the said Lake of the Woods, thence through the said lake to the most north-western point thereof; and from thence on a due west course to the River Mississippi."

What I say is this, that the subsequent treaties, and I am going to read them, indicate that the view of the powers at that time, in agreeing to the north-west angle* of the Lake of the Woods, was that that was as near as possible the forty-ninth parallel. Up to the forty-ninth parallel they take the water course—it was more convenient to take the water boundary. But when they go to the Lake of the Woods, instead of going to the north-west, they go to the north-west angle* and, as the subsequent dealings between Great Britain and the United States shew, that was on the theory that that was the 49th parallel.

The LORD CHANCELLOR.—I do not follow that.

Mr. MCCARTHY.—I am going to point that out by the subsequent Treaties. There is an explanation of why that was adopted at that place.

Lord ABERDARE.—The 49th parallel strikes the southernmost portion of the Lake of the Woods, but not the north-west portion.

Mr. MCCARTHY.—But what I say is, that at that time it was understood that that was as near as they could come to the 49th parallel.

Sir MONTAGUE SMITH.—Why did not they say so?

The LORD CHANCELLOR.—Supposing it was?

Mr. MCCARTHY.—I am asked to explain why it was the north-west angle* was taken.

The LORD CHANCELLOR.—We have nothing to do with why at all. The question is one of fact. Here is a boundary laid down in the Treaty between the United States and Great Britain as to the southern boundary of Canada.

Mr. MCCARTHY.—Yes.

The LORD CHANCELLOR.—The question how they came to fix that boundary is entirely different from the question that they did fix it.

Mr. MCCARTHY.—If it is the fact that they took the 49th parallel, and took it because that had been treated from the Treaty of Utrecht onward as the southern boundary of the Hudson's Bay territory, is it not important then?†

The LORD CHANCELLOR.—Not the least, I should think.

Mr. MCCARTHY.—Then I need not argue it; but we are prepared to shew you that, all through, the United States conceived, and Great Britain admitted, that the Treaty of Utrecht had considered the 49th parallel as the southern boundary of their territory prior to the cession, and that formed the basis of all the Treaties between not merely the United States and Great Britain but between the United States and Spain,‡ and so on. If your Lordships look at the last extract in the Manitoba Appendix you will see it plainly stated.§

* See *ante*, p. 318, note †.

† As to the reasons for drawing the line of the Treaty of 1783, westward of Lake Superior, through the particular water communications and to the most north-western point of the Lake of the Woods, see *ante*, pp. 107, note, and 222, note †. There is nothing to shew that regard was had on that occasion to the line of the 49th parallel either in the selection of the most north-western point of the Lake of the Woods, or in the prolongation of the line, "from thence on a due west course to the River Mississippi." As to the Convention of 1818, however, which settled the 49th parallel as the boundary to the westward of the Lake of the Woods, that is, between Louisiana (shortly before come into the possession of the United States) and the British possessions in that quarter, see *Ibid.*

‡ Spain's interest was in respect of the northern boundary of Louisiana when that region was a Spanish possession.

§ The extract here referred to is, "from the Report on Military Affairs made to Congress in 1843," and is a piece of specious reasoning in the unsuccessful endeavor to demonstrate that the 49th parallel was settled as the boundary under the Treaty of Utrecht. That neither that nor any other line of boundary was ever settled under the Treaty of Utrecht is abundantly clear upon the evidence before the Board, and has been already shewn on the argument.

LORD ABERDARE.—They only touch the 49th parallel at the very point where it was supposed that the territory of Ontario ends.

Mr. MCCARTHY.—Yes; but perhaps I may refer to the other treaties before I go to that. In 1794 the next treaty took place. That is at page 547 and was between the United States and Great Britain. It is called Jay's Treaty, or the Treaty of Amity, and acknowledges the Hudson's Bay Charter, which of course is not now in dispute for the purpose of this investigation, in Article 3; and then, at page 549, there is this:

"Article IV. Whereas it is uncertain whether the River Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods in the manner mentioned in the Treaty of Peace between His Majesty and the United States, it is agreed that measures should be taken in concert with His Majesty's Government in America and the Government of the United States for making a joint survey of the said river, from one degree of latitude below the Falls of St Anthony, to the principal source or sources of the said river, and also the parts adjacent thereto, and that if, on the result of such survey, it should appear that the said river would not be intersected by such a line as is above mentioned, the two parties will thereupon proceed by amicable negotiation to regulate the boundary line in that quarter, as well as all other points to be adjusted between the said parties, according to justice and mutual convenience, and in conformity to the intent of the said Treaty."

Then follows the Treaty of 1814,* on the same page—the Treaty of Ghent. Then comes the Convention of 1818 on the next page, 550:

"Article II. It is agreed that a line drawn from the most north-western point of the Lake of the Woods, along the 49th parallel of north latitude, or, if the said point shall not be in the 49th parallel of north latitude, then that a line drawn from the said point due north or south, as the case may be, until the said line shall intersect the said parallel of north latitude, and from the point of such intersection, due west, along and with the said parallel, shall be the line of demarcation between the territories of the United States and those of His Britannic Majesty, and that the said line shall form the northern boundary of the said territories of the United States, and the southern boundary of the territories of His Britannic Majesty, from the Lake of the Woods to the Stony Mountains."

*Treaty of Ghent, concluded the 24th of December, 1814.

Article VI. Whereas by the former Treaty of Peace, that portion of the boundary of the United States from the point where the forty-fifth degree of north latitude strikes the River Iroquois or Cataraquy, to the Lake Superior, was declared to be "along the middle of said river into Lake Ontario; through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie; through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior;" and whereas doubts have arisen what was the middle of the said river, lakes, and water communications, and whether certain islands lying in the same were within the dominions of His Britannic Majesty or of the United States: In order therefore finally to decide these doubts, they shall be referred to two Commissioners, to be appointed, sworn, and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding article, unless otherwise specified in this present article. The said Commissioners shall meet, in the first instance, at Albany, in the State of New York, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall, by a report or declaration, under their hands and seals, designate the boundary through the said river, lakes, and water communications, and decide to which of the two contracting parties the several islands lying within the said river, lakes, and water communications, do respectively belong, in conformity with the true intent of the said Treaty of one thousand seven hundred and eighty-three. And both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two Commissioners differing, or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them, or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the Fourth Article is contained, and in as full a manner as if the same was herein repeated.

Then the Treaty of 1842* goes more definitely into the line, commencing at the mouth of the Pigeon River and going up that line. I submit that these Treaties indicate that the intention in taking the north-west angle of the Lake of the Woods was first in the belief that it was south of the source of the Mississippi. If it was south of the source of the Mississippi it was in the Province of Quebec and was not in the Hudson's Bay territories. Then afterwards, when doubts came to arise as to where the source was, they agreed that the country should be surveyed and the source ascertained. Finally, it was agreed that the 49th line should be taken. Now, if your Lordships will look at the statement of the Report of the Committee on Military Affairs, made to Congress in 1843, you will see an explanation of it. It is the last page which has been added to the book of the Manitoba Appendix: "The Treaty of Utrecht was concluded in 1713." Then it goes on to say what the 10th article was: "This line," that is the line of the 49th parallel, "is generally considered in the United States, and has been assumed by their government, as the true boundary." Before that there is:

"One of these lines is drawn irregularly from the Atlantic to a point in the 49th parallel of latitude," that is from Grimington Island or Davis's Inlet, "south of the southernmost part of Hudson's Bay, and thence westward along that parallel to Red River, and in some maps still further west. This line is generally considered in the United States, and has been assumed by their government, as the true boundary, settled by the commissioners agreeably to the treaty above mentioned Thus we find Messrs. Monroe and Pinckney at Madrid, in 1805, writing to the Spanish Minister as follows: 'In conformity with the tenth article of the first mentioned Treaty [Treaty of Utrecht] the boundary between Canada and Louisiana on the one side, and the Hudson's Bay and Northwestern Companies on the other, was established by Commissioners by a line to commence at a cape or promontory on the ocean, in 58 degrees and 31 minutes north latitude, to run thence southwestwardly to latitude 49 degrees north from the equator and along that line indefinitely westward'"

The Lord Chancellor.—We have hitherto been told by both sides, I think, that that never was established at all.

*Treaty between Great Britain and the United States, concluded the 9th of August, 1842.

Article II. It is, moreover, agreed that, from the place where the Joint Commissioners terminated their labours, under the VI. Article of the Treaty of Ghent, to wit, at a point in the Neebish Channel, near Muddy Lake, the line shall run into and along the ship channel between St. Joseph's and St. Tammany Islands, to the division of the channel at or near the head of St. Joseph's Island; thence turning eastwardly and northwardly around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's from St. Joseph's Island; thence up the East Neebish Channel nearest to St. George's Island, through the middle of Lake George; thence west of Jonas' Island into St. Mary's River, to a point in the middle of that river, about one mile above St. George's or Sugar Island, so as to appropriate and assign the said island to the United States; thence adopting the line traced on the maps by the Commissioners, through the River St. Mary and Lake Superior, to a point north of Ile Royale, in said lake, one hundred yards to the north and east of Ile Chapeau, which last mentioned island lies near the north-eastern point of Ile Royale, where the line marked by the Commissioners terminates; and from the last mentioned point south-westerly through the middle of the sound between Ile Royale and the north-western main land, to the mouth of Pigeon River, and up the said river to and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communication to Lake Saisaginaga, and through that lake; thence to and through Cypress Lake, Lac du Bois Blanc, Lac La Croix, Little Vermillion Lake, and Lake Namecan, and through the several smaller lakes, straits, or streams connecting the lakes here mentioned, to that point in Lac La Pluie, or Rainy Lake, at the Chaudière Falls, from which the Commissioners traced the line to the most north-western point of the Lake of the Woods; thence along the said line to the said most north-western point, being in latitude 49° 23′ 55″ north, and in longitude 95° 14′ 38″ west from the Observatory at Greenwich; thence according to existing Treaties, due south to its intersection with the 49th parallel of north latitude, and along that parallel to the Rocky Mountains: It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries.

Mr. McCarthy.—I know; but I am just giving your Lordships the statement of this Committee on Military Affairs made in Congress:

"These extracts are taken from the memoir of Mr. Greenhow, who, it is proper to add, considers the opinion that these boundary lines were actually established by the Commissioners 'at variance with the most accredited authorities.' In this opinion the Committee do not concur. So far from doing so, it is thought the presumption that the 49th parallel was adopted by the commissioners under the Treaty of Utrecht, is strengthened by the line of demarcation subsequently agreed on by the Treaty of Versailles in 1763, between France and Great Britain, and also by the Treaty of Peace of 1783, between the United States and Great Britain. By the former the confines between the British and French possessions were irrevocably fixed 'by a line drawn along the middle of the Mississippi from its source to the Iberville,' etc. By the latter, that part of the northern boundary of the United States which is applicable to the subject is described to be through the Lake of the Woods 'to the most north-western point thereof, and from thence on a due west course to the River Mississippi.' The most north-western point of the Lake of the Woods is perhaps a few minutes north of the 49th parallel of latitude."

Then it goes on to speak of the Convention of 1818:

"In the second Article it is agreed that a line drawn from the most north-western point of the Lake of the Woods, along the 49th parallel of north latitude, or if the said point shall not lie in the 49th parallel of north latitude."

Then it would lie in the line I have already read to your Lordships:

"This line, it will be observed, is a deviation from the boundary established in the Treaty of 1783; for that was to extend due west from the north-western point of the Lake of the Woods, without any reference to its latitude. By this, we are in the contingency named, to run by the shortest line, from the specified point on the Lake of the Woods, to the 49th parallel of latitude. Whence, it may be asked, the solicitude to adopt this particular parallel, except as it corresponded with pre-existing arrangements which could have been made under the provisions of the Treaty of Utrecht alone; for under no other had any reference, at that time, been made to the said 49th degree. This coincidence between the boundaries established by Great Britain and France in 1763, and between Great Britain and the United States, 1783 and 1818, can scarcely be accounted for on any other supposition than that the said line had been previously established by the commissioners under the Treaty of Utrecht. This conclusion is strengthened by a further coincidence in the boundaries fixed in the said Treaties of 1763 and 1783. In both the Mississippi is adopted as the boundary. One of the lines then (the Mississippi) previously established between Great Britain and France, being thus, beyond all cavil, adopted between the United States and Great Britain, may it not be fairly inferred, in the absence of all proof to the contrary, and with strong corroborating proof in favor of the inference drawn from the stipulation of treaties, lines of demarcation on old maps, etc., that the other line (forty-ninth parallel), equally beyond cavil, established by the United States and Great Britain, was also the same one previously existing between Great Britain and France? But such line had no existence unless under the stipulation of the Treaty of Utrecht. For these reasons the Committee have adopted the opinion that the forty-ninth parallel of latitude was actually established by the commissioners under that treaty. It may not be unimportant here to observe that this forty-ninth parallel is not a random line arbitrarily selected, but the one to which France was entitled upon the well settled principle that the first discoverer of a river is entitled, by virtue of that discovery, to all the unoccupied territory watered by that river and its tributaries."

So that I think I have been able to shew some authority for my proposition that that was the reason the 49th line was chosen."*

*See *ante*, p. 321, notes † and §.

The LORD CHANCELLOR.—You have shewn that a Committee of Military Affairs reported to Congress the motive why the actual boundary was really fixed, namely, that it was founded on the supposition that the commissioners under the treaty of Utrecht had fixed the 49th parallel.

Mr. MCCARTHY.—Of course that is all, but it is some support I submit for my proposition.

The LORD CHANCELLOR.—I do not know what your proposition is, because, supposing it to be established ever so clearly that they imagined the boundary was fixed to coincide with the 49th parallel, when it did not what would follow?

Mr. MCCARTHY.—It explains at all events the action of the commission.

The LORD CHANCELLOR.—It explains nothing surely but a motive for what was done. If it is done and remains, it is just as efficacious.

Mr. MCCARTHY.—But the commission could not enlarge the Province, which was fixed by Act of Parliament.

The LORD CHANCELLOR.—The commission would not take away from the United States what belonged to the United States, but it could most distinctly determine what the British Province of Quebec should be.

Mr. MCCARTHY.—That we propose to argue. After the Act of 1749* was passed, the commission could not do it. It was fixed by Act of Parliament, and the commission could not determine it.

The LORD CHANCELLOR.—But if you make out that the two are inconsistent, it falls to the ground.

Mr. MCCARTHY.—Now, if your Lordships will allow me, I will refer to a book I mentioned the other day, merely for the historical statement of facts. I need not trouble your Lordships with any other reference to it. I refer to Sir Travers Twiss' book. I did not explain what the nature of the book was. When the Oregon question, which turned on this 49th parallel, was under discussion, he wrote from the English point of view, as Mr. Greenhow wrote from the American point of view. It has nothing to do with this question in the world, except incidentally. I mean it has no reference to the Canadian dispute.

The LORD CHANCELLOR.—How can his opinion, or his view of the fact, be of more importance than your argument and the documents now before the Committee?

Mr. MCCARTHY.—Well, he is a gentleman who has devoted himself to these questions.

The LORD CHANCELLOR.—He is no expert as to questions of fact.

Mr. MCCARTHY.—No, my Lord, but he states the fact.

The LORD CHANCELLOR.—We have got some large books here, with all the materials, and we have been at full length through them, and I do not think we can get any enlightenment from such a book.

Mr. MCCARTHY.—Now, I will trouble your Lordships with one more commission and that is all I have to say of the commissions. My learned friend who is with me, or those attending on behalf of the Dominion, will go into the point, which I do not propose to discuss, as to the efficacy of this commission. What I say is, that this commission to Lord Durham, so far as the western boundary is concerned, which is to be found at page 406,† and speaking simply of the west at present, because I will not say anything as to the east, because that will anticipate what my learned friend has to say.

The LORD CHANCELLOR.—The west takes you into Lake Superior and no further.

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* *Que.* 1774. † Printed, *ante*, p. 308, note §.

Mr. McCarthy.—No, my Lord.

The Lord Chancellor.—That is true; but then you suppose that the whole of Canada stops at the point where Lake Superior discharges itself into Lake Huron.

Mr. McCarthy.—No, my Lord; what I say would be the proper meaning to give to this commission, with deference, is this: If we gave a liberal interpretation to it, it would confine and describe no territory. One must therefore give some territory to it, and I submit it would follow, up the middle of Lake Superior, the line which bounded the British territory up to the height of land. And possibly the difficulty was about going beyond the height of land—which was then becoming perfectly well known to be in dispute—in the event of the Government finding the territories more definitely marked.

The Lord Chancellor.—You will say that, according to your contention, if the western boundary had continued it ought to have so continued, but as a matter of fact it is not continued, and as you are only taken into Lake Superior, by this you are left to find out *aliunde* what there was to the west.

Mr. McCarthy.—The argument I advance is this, that at that time doubts began to arise as to the validity of the other commissions going so far west.*

The Lord Chancellor.—I should have thought that the true inference is, that the knowledge in the possession of those who drew up the other commissions was not sufficient to enable them with accuracy to define anything further west.[1]

Mr. McCarthy.—That is what I meant to say.

The Lord Chancellor.—But that does not imply that there was any doubt as to the validity of the commission.

Mr. McCarthy.—No; I did not mean to put it in that way.

The Lord Chancellor.—I thought you did.

Mr. McCarthy.—No, my Lord, I did not. But I mean doubts began to be entertained as to where the west of Upper Canada was,* so that they did not pretend to determine it by the commission.

The Lord Chancellor.—That is a well-founded observation, that the western boundary is not defined,† but what seems of great importance is that the northern boundary is along the shore of Hudson's Bay.

Mr. McCarthy.—Yes. I wish to observe your Lordship's rule, and therefore do not go into the effect of the commissions. My learned friends who are to follow me will deal with that, and they would not be following your Lordship's rule if they repeated what I had said. Therefore I leave that to my friends.

Now, I have some observations to make, and they shall be very few, because my learned friend will have to deal with this in some measure. But I do not think I ought to close my statement without making some references as to the doctrine of law on which we rely as to the height of land. I suppose I may refer to Sir Travers Twiss' work on international law, as I suppose your Lordship will allow me to do to Mr. Halleck's works and other works on international law.

The Lord Chancellor.—The thing which I am at a loss to understand is how the boundaries between two different territories can possibly be determined by international law, unless you include in international law all conventions, acts and documents of title which have to define those boundaries.

* There is no foundation in evidence for these suggestions of counsel. The true explanation was, that the Commissioners under the Treaty of Ghent had not defined the international boundary in this quarter farther than into Lake Superior. See *ante*, p. 308, note §.

† For the explanation, see *Ibid.*

Mr. McCarthy.—I mean this, and your Lordship will say whether I am to go on or not; but what I understand is this, that from time to time nations have agreed upon certain well known rules for settling matters of this kind, and that this question as to the watershed, and as to the territory which one nation that discovers becomes entitled to, has in that way—by conventions, by arguments adduced at those conventions, by settlements made upon references—been so firmly established that it may now be accepted as a well known rule of international law. Now that well known rule of international law, so far as this continent is concerned of course, in early times—within the last century I may say—was of very great importance. There was an enormous continent; the discoveries had all been made from the ocean; each discoverer and each occupier was claiming certain quantities of land by reason of that discovery, and that gave rise to disputes and difficulties which ultimately have been settled, and settled upon a fair and reasonable basis, and these rules are now incorporated—if they were not incorporated before, and I think that the earlier authorities shew that they were—as rules of international law. Now I have already stated what I understand to be that rule, and what I understand also to have been the dispute with regard to that rule. One claim put forward by the Americans, which ultimately they had to withdraw as the argument was against them, was this: that the mere discovery of the mouth of a river gave to the discoverer the whole of that river (I mean followed by occupation, because I am assuming occupation in all cases) and the land that was drained by it. Then the British authorities stated that that was stating the claim too widely, and that the true rule was this, that not merely the discovery of the river, but the discovery and settlement of the coast line, gave to the discoverer and settlers of that coast line all the country that drained into it. And upon that basis the French seem to have proceeded from the earliest times. The English at first took a wider view. They claimed that the mere discovery of the coast line gave them all that they chose to claim back even to the very ocean. The French took a more correct view by saying that it gave them a right to all the land that it watered, down to the sea where the discovery was made; and so I have read, once or twice, references to the commissions of the French King and his officials and governors, in which it is referred to as to the land drained by such a stream. Now I will read from Sir Travers Twiss' work, the second edition, page 196.

Lord Aberdare.—Did the French claim all the land which was watered by the tributaries of the Mississippi from the east to the west?

Mr. McCarthy.—Yes; in fact they did, I mean the discoverer La Salle proclaimed that on his discovery.

Sir Robert Collier.—According to that view, if a few miles of the coast on either side of the mouth of a river were discovered and settled you might claim any extent of country you like to suppose.

Lord Aberdare.—That is to say that the discoverer of the mouth of the Mississippi, or the land on either side of the Mississippi, could claim not only the lands on the line of the Mississippi, but all the lands watered by the enormous tributaries of the Mississippi on either side.

Mr. McCarthy.—That is what the French claimed and what La Salle claimed when he erected the post and put the French arms upon it. Then the portion of that west of the Mississippi was ceded to Spain, and then Spain gave that to the States, and then the question arose, and it was with regard to that that this passage which I am going to refer to was dealt with. This is Sir Travers Twiss' book, and I am reading at present at page 196.

Sir BARNES PEACOCK.—But what treatise is it—on International Law, I suppose ?

Mr. MCCARTHY.—Yes.

Sir ROBERT COLLIER.—You may read it *valeat quantum.*

Mr. MCCARTHY.—

"The exclusive right of a nation to territory which it has acquired by occupation, has been universally recognized by the nations of Europe, and in respect of such right certain rules have become established by usage, whereby the condition of law constituting occupation may be placed beyond doubt. The natural right of an individual to appropriate—"

Then he goes on to give the reasons for that, which I need not trouble your Lordships with reading. Then section 119 :

"A nation is under an obligation towards other nations analogous to that under which an individual stands towards other individuals with regard to the discovery of a thing. If it seeks to found an exclusive title to its possession upon the right of discovery, it must manifest in some way or other to other nations its intention to appropriate the territory to its own purposes. The comity of nations then sanctions a presumption, that the execution of the intention will follow within a reasonable time the announcement of it. But natural reason requires that the discovery should be notified to other nations, otherwise if actual possession has not ensued, the obvious inference would be that the discovery was a transient act and that the territory was never taken possession of *animo et facto.*"

Then he says that the meaning of notification is, either by notifying it formally, or taking possession. Then we come to section 120, which I do not think I need read to your Lordships. Then section 122 :

"When discovery has been followed by the settlement of a nation, other nations, in accordance with the law of nature, recognize a perfect title in the occupant. Where discovery has not been immediately followed by occupation, but the fact of discovery has been notified, other nations, by courtesy, pay respect to the notification, and the usage of nations has been to presume that settlement will take place within a reasonable time ; but unless discovery has been followed within a reasonable time by some sort of settlement, the presumption arising out of notification is rebutted by *non-user*, and lapse of time gives rise to the opposite presumption of abandonment."

That point does not become important here because there was the occupation.* Now here is section 123, as to the extent of right which the discovery gives :

"The two rules generally, perhaps universally, recognized and consecrated by the usage of nations, have followed from the nature of the subject."

This is quoting now from Mr. Gallatin on the other side, the plenipotentiary of the United States, who thus states his view:

"By virtue of the first, prior discovery gave a right to occupy, provided that occupancy took place within a reasonable time, and was ultimately followed by permanent settlement and by the cultivation of the soil. In conformity with the second, the right derived from prior discovery and settlement was not confined to the spot discovered or first settled. The extent of territory which would attach to such first discovery or settlement, might not, in every case, be precisely determined. But that the first discovery and subsequent settlement, within a reasonable time, of the mouth of a river, particularly if none of its branches had been explored prior to such discovery, gave the right of occu-

* On the contrary it was claimed on behalf of Ontario, and the evidence shews, that the French were the first occupants. See *ante*, pp. 189, note †, 200, note *, 250, note ‡, 253, note * ; and appendix B, hereto.

pancy, and ultimately of sovereignty, to the whole country drained by such river and its several branches, has been generally admitted, and in a question between the United States and Great Britain, her acts have with propriety been appealed to, as shewing that the principles on which they rely accord with their own."

Now comes Sir Travers Twiss' view upon that:

"The question as to the extent of territory over which the discovery of a part gives rise to the right of occupancy, may receive a solution by reference to the principles of law which decide to what extent actual possession must go in order to give a title to more than is actually inhabited. It is not necessary, in order to constitute the occupant of a thing the legal proprietor of it, that he should have actual possession of the whole of it. If he has possession of a part, which cannot be separated from the whole, he is in possession of the whole."

Then section 125 is:

"The principles applicable to such questions were discussed by the commissioners of the United States of America, in the negotiations with the commissioners of Spain, on the subject of the western boundary of Louisiana"—which is just the point which your Lordship was putting to me a moment ago—"'The principles,' they observe, 'which are applicable to the cases are such as are dictated by reason, and have been adopted in practice by European nations in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and at the same time founded in strict justice. The first of these is, that when any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior country, to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and so give it a right in exclusion of all other nations to the same. It is evident that some rule or principle must govern the rights of European powers in regard to each other in all such cases, and it is certain that none can be adopted, in those cases to which it applies, more reasonable or more just than the present one. Many weighty considerations shew the propriety of it. Nature seems to have destined a large range of territory so described for the same society; to have connected its several parts together by a common interest, and to have detached them from others. If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition, but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of a European power who discovered and took possession of a new country, to the spot on which its troops or settlements rested, a doctrine which has been totally disclaimed by all the powers who made discoveries and acquired possessions in America. The other extreme would be equally improper, that is, that the nation who made such discovery should, in all cases, be entitled to the whole territory so discovered."

Then he speaks of an island and says that if an island be discovered it all goes. At section 126 he says:

"The position of law maintained on behalf of the United States by Mr. Gallatin, in 1827, above alluded to, had been previously advanced by Mr. Rush, in 1824, when resident as Minister Plenipotentiary of the United States in London. 'I asserted,' he writes to the American Secretary of State, Hon. J. Quincy Adams, 'that a nation discovering a country by entering the mouth of its principal river at the sea coast, must necessarily be allowed to claim and hold as great an extent of the interior country as was described by the course of such principal river and its tributary streams. The plenipotentiaries of the United States in support of their position appealed to the language of ancient charters—"

and so on. Then:

"It was replied on behalf of the British plenipotentiaries, that those charters had no valid force or effect against the subjects of other sovereigns, but could only bind and

restrain, *vigore suo*, those who were under the jurisdiction of the grantor of the charters, and that although they might confer on the grantees an exclusive title against the subjects of the same sovereign power, they could only affect the subjects of other sovereign powers so far as the latter might be bound, by the common law of nations, to respect acts of discovery and occupation effected by the members of other independent political communities."

Lord ABERDARE.—That last position does not seem to have been contested by Rush.

Mr. MCCARTHY.—Yes, my Lord, he contended for a much wider position. He contended that the mere discovery of the land near a river gave the whole of the territory; the British said not.

Lord ABERDARE.—Although a part of the land watered by the tributaries or the principal river had been already occupied.

Mr. MCCARTHY.—No, my Lord, I do not think that is contended. The discoveries were always from the sea in this country,* and being from the sea there could be hardly any foreign power or rival power at the head of the stream. At section 127 then he says:

"The principle involved in the position of law advanced by the United States on the above occasions, seems not to be reconcilable with other positions of law in which all nations agree. It is inconsistent in the first place, with one of the positions of law upon which the United States themselves rested their claims against Spain respecting the boundary of Louisiana, in 1805, namely, that the discovery and occupation of an extent of sea coast by a nation are understood to convey to that nation a right of possession over the interior country as far as the watershed line, which position of law Messrs. Monroe and Pinckney, the commissioners of the United States, then alleged to have been completely established by the controversy between France and Spain on the one hand, and Great Britain on the other, which produced the war of 1755 between those nations. It is obvious that a claim to all the lands watered by a river and its tributaries, founded on the discovery and occupation of the mouth of the river, must conflict with a claim to all the inland territory, as far as the line of watershed, founded on the discovery and occupation of an extent of sea coast, about which latter position of law there is no dispute amongst nations."

Now there are many authorities—it is not merely Sir Travers Twiss—to the same effect, and all of them are quite consistent with what I have read. My learned friend will refer to them more in detail. But what is the reason of it? One reason is given in the book which I have just read. Another reason is that if you allow a rival nation to come to the head waters of the stream you would have no opportunity of defending yourselves against them; they would come down with ease and swiftness, and without any opportunity being afforded of preparing for defence.† And therefore it has been essential in the settlement of these new countries that some such reasonable rule should be adopted. I refer also to Sir Robert Phillimore's work, the second edition, volume 1, pages 277 and 279, where

*There may be said to be two exceptional instances, both in connection with the French occupation. Firstly, the Hudson's Bay territories, claimed by the English on the ground of their operations and alleged discoveries on the shores of the Bay, but by the French, operating chiefly overland, from the St. Lawrence, with occasional voyages by sea, as an undoubted part of Canada, embraced in their charters, tributary commercially to their traders and trading posts, guarded from usurpation and intrusion by their military and naval expeditions; secondly, Louisiana, embraced in the early English charters, purporting to cover territories stretching from the Atlantic seaboard to the Pacific, but explored by the French, firstly, from the upper reaches of its rivers—the Mississippi, the Ohio, the Missouri—and continuing in their occupancy until the cession to Spain.

†This argument is taken, not from Twiss or Phillimore, but from Dumas' *memoire* on the Boundaries of Canada, put in by Ontario; and had reference, not to the Hudson's Bay territories, but to the southern limits of Canada towards the English colonies, and towards Louisiana. (Joint App., p. 526.)

he lays it down in the same very clear and unmistakeable terms to which I have just referred.

Those are the propositions of law for which we contend; and now to apply them. I have done with the facts now, and will say just a few words as to the application of the points which I have endeavoured—I am afraid at some length, but, as far as I can, consistently with my duty—to lay before your Lordships. I say in the first place that the possession of the English and the Hudson's Bay people of this territory are correlative—or rather interchangeable. That would be the better expression—that the English had no claim to the Hudson's Bay country except that which they gave to the Merchants Adventurers of Hudson's Bay. I submit that by the words of the charter, as understood in international law, and with reference to the dealings with the American continent, that did give, in terms, to the Hudson's Bay Adventurers, so long as it was not at that time occupied by any foreign Christian power, all the watershed of Hudson's Bay. I say that is the real meaning of the charter, as explained by international law, and adopted of course in municipal law. If that be so—and I have already stated to your Lordships that there is no pretence of any occupation[1] by the French, at that date, and no settlement,* then we come down to see whether anything happened since, by which the limits of the land or territory granted has been curtailed. I submit there has not been.† I admit that as between the French and English, and owing to the troubles which took place at that time, these limits would have been curtailed, but nevertheless, upon the restoration of the country to England, under the well known rule of *postlimini*, as it is called, all the private property would have reverted to the Hudson's Bay Company. The English Crown, against its own charter, according to well recognized rules of law, having obtained back—assuming now for the sake of argument that it had lost a portion of the Hudson's Bay territory by the wars which happened between 1676 and 1713—having obtained it back again in 1713 and 1763, the effect of that would be, as a matter of law, I submit, that that would revert back to the original donees of the grant—the Hudson's Bay Company. That is, as I understand, the clear, well-defined principle of law which goes under the name of *postlimini*, in other words that the private property of the subject of a state who reconquers territory which formerly belonged to the private individual, does not enure to the benefit of the public, but it enures to the benefit of the private owner. So that I submit, broadly, that it is of no consequence whether the French did or did not encroach upon this territory; the effect upon the retrocession, or the cession, of this property to Great Britain would be equally the same.‡ But

* The evidence is to the contrary. As to the priority of the French title and possession, see *ante*, pp. 189, note †, 200, note *, 250, note ‡, 253, note *; appendix B, hereto.

† But counsel, as the fact was, admits in the very next line of the text that there had been an actual curtailment. As to the invocation by counsel of the *jus postliminium* by way of qualification to this admission, the entire fallacy of that position, under the circumstances of this case, is set forth in the next note, *infra*.

‡ The right of *postliminium* is defined as "that in virtue of which, persons and things taken by the enemy are restored to their former state, on coming again into the power of the nation to which they belonged" (Vattel). The contention of Ontario was that the argument founded upon the supposed application of the principle to the present case was fallacious and a mere begging of the question at issue, the validity of the grant to the Hudson's Bay Company, under the charter of 1670, being denied in *toto* as respected territories in the possession of France, and which moreover were excluded by the terms of the instrument itself—"not already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State." The priority of the French title and possession was beyond controversy on the evidence (*ante*, pp. 189, note †, 200, note *, 250, note ‡, 253, note *; and appendix B, hereto); that even granting for argument's sake, the validity of the territorial grant, its subsequent curtailment (admitted by counsel) or practical effacement, by the operations and acquisitions of the French, conserved to them by the treaties of Neutrality (1687) and of Ryswick (1697) put an end to any right of *postliminium* which might have obtained under the former conditions: for the rule, in that view, is, that a place "ceded to the enemy by a

as a matter of fact, I submit that while it is true that in 1700, and after the Peace of Ryswick, there was a claim set up by the French to very nearly all the Hudson's Bay—practically to all the Hudson's Bay—which on the other hand was denied by the English, as your Lordships will remember, who stated that the effect of the treaty would be merely to cause the English to deliver to the French the actual posts mentioned in the treaty, and not the territory itself*—that whatever may have been the effect of that treaty, everything connected with that was swept away by the Treaty of Utrecht;† that by the Treaty of Utrecht the country to which the Hudson's Bay people were entitled was restored‡—that a line was fixed—or rather a rule for ascertaining the line was fixed—which was in point of fact the watershed;§ that that can be as well defined to-day, in a dispute arising, as this dispute does arise, as to the limits of the Hudson's Bay, as it could have been by the commissaries; that the commissaries were only a method pointed out by the treaty of fixing that limit, but that the rule being laid down and established in the treaty, that all the Hudson's Bay and Straits, and the rivers and the lands belonging thereunto, be restored to Great Britain, we are just as competent in this country as the commissaries were within a year after the treaty, to have defined and marked down that limit. And that line would be the watershed;§ or if it be not the watershed, after what has taken place it would be the 49th line. That 49th line was accepted by the British as the proper line which they were prepared to contend for, which they did contend for, and which is binding in honour upon the Crown. I cannot assume to the Crown dishonour. After its obtaining the property again from the French, the Crown was in this position. It contended on behalf of the Hudson's Bay Company that the true line was the 49th parallel. The Crown then got the territory, and dishonour cannot be imputed to the Crown—and it would be imputing dishonour to the Crown, to say that the Crown could turn round and say to the Hudson's Bay Company: "True, last year we said that was your territory—we have got it now but you have got to prove that it is your territory." I do not mean to say the Crown is estopped; but I mean to say it would be imputing dishonour to the Crown to suggest any other course had been taken.‖ The Crown never objected to the Hudson's Bay Company; on the contrary, the Hudson's Bay Company remained in occupation,¶ and went down as far as Red Lake.** From time to time it occupied the whole

treaty of peace has no longer any claim to the right of *postliminium*," that the alienation "is valid and irreversible," and such that no reclamation can be made, even "if, in the sequel, some fortunate revolution" should wrest it from the hands of the conqueror (Vattel, Book III, chap. iv.) Kent puts it very succinctly: "If the real property, as a town, or portion of the territory, for instance, be ceded to the conqueror by the treaty of peace, the right of postliminy is gone for ever * * The right of postliminy no longer exists after the conclusion of the peace." (Ed. 1866, pp. 282-3.) It is to be remembered that at the time of the Treaty of Ryswick, France was in actual possession of all the posts which had been of the Hudson's Bay Company with one exception, and that this one also rightfully belonged to the French under the terms of the treaty.

* This, in reality, was the contention of the French, after the Treaty of Utrecht, and has here no application, for the English had never held the territory itself, or any portion of it, but only—for a time—the posts on the margin of the Bay.

† This is a begging of the question. See the discussion, *ante*, pp. 279-80.

‡ For the answer to this, see *ante*, pp. 190, note †, 331, note ‡.

§ This is the repetition of a contention already very emphatically disallowed by their Lordships, at an earlier stage of the argument, as not well-founded (*ante*, pp. 216-218.)

‖ The evidence does not sustain the contention and inferences of counsel, in regard to the line of 49°, nor could dishonour be attributed to the Crown in the circumstances of this case. See *ante*, pp. 190, note †, 235, note *, 331, note ‡.

¶ Of the posts only on the shores of the Bay after 1713, with the sole exception of Henley. The French retained the posts and the trade of the interior. Appendix B. hereto.

** Not until 1790; and this Red Lake was far north, on the north-eastward slope of Lake Winnipeg.

country.* In 1821 we find Lord Bathurst suggests this compromise between the two companies. We find then a license was granted,† and that that license was again renewed,‡ recognizing it with a perfect knowledge of all that took place, and we say the Crown has not only recognized it, but it has refused, when appealed to by Canada, to test the validity of the Hudson's Bay charter. Both Mr. Labouchere, in the letter I have read to your Lordships, and the Duke of Buckingham afterwards, state that it would not be within the principles recognized in Great Britain for us to object in any sense, but if you choose to do so you can.§ Afterwards it became necessary that this colony‖ should be taken in. I repeated my argument so recently with regard to Rupert's Land that I need not trouble your Lordships by repeating it again. For these reasons, I submit, subject to what my learned friend has to say with regard to the due north line, that either the due north line, from the confluence of the rivers is the proper western boundary, or if not that, the proper boundary is the height of land; or, if your Lordships choose, the line which would be represented by the 49th line. Practically the 49th line and the height of land are the same.¶ I suppose the Province of Ontario would much rather have the height of land than the 49th line.

* The Company did not move away from the shores of the Bay to set foot in the North-West until 1774, when they established Fort Cumberland; they established no other until 1790; and the Red River was not reached until 1799. It is needless to state that after 1763 the Company had in the North-West the same rights as any other British subjects. On their advent they found the country already occupied by the Canadian traders, whose footsteps they endeavoured to follow But with only a partial success, as is evident on a comparison of the number of posts held by them and the North-West Company of Montreal, respectively, as late even as 1821. In that year the Hudson's Bay Company's posts numbered, all told, 36, the North-West Company's, 97, nigh three times as many. It cannot therefore be rightly said that they then, or at any time theretofore "occupied the whole country." Their subsequent occupation was in conjunction with the North-West Company, either as co-lessees or as co-partners.

† To the two companies jointly.

‡ To the two companies amalgamated as one.

§ The Imperial authorities never pledged themselves to the validity of the charter, but, on the contrary, were, at times, even disposed to take proceedings for testing its validity. Thus on 3rd November, 1858, Earl Carnarvon, by direction of the then Colonial Secretary, Sir E. B. Lytton, informed the Company that if they persisted in declining to be parties "in an appeal to, and a decision by, a judicial committee of the Privy Council, with the concurrence alike of Canada and the Hudson's Bay Company, and can suggest no other practicable mode of agreement, Sir E. B. Lytton must hold himself acquitted of further responsibility to the interests of the Hudson's Bay Company, and will take the necessary steps for closing a controversy too long open, and for securing a definite decision." Again, on 9th March, 1859, Sir E. B. Lytton, through the Under-Secretary, intimates that if Canada's "answer does not arrive by the 1st of May, Her Majesty's Government must feel themselves free to act," and that as to giving effect to the recommendation of "the 13th Resolution of the Committee of the House of Commons * * * Her Majesty's Government could not but see that the fairest and most direct method to accomplish it, was to test, not the limit but the validity of the charter itself;" and in 1869, as already quoted, Earl Granville, the Colonial Secretary, intimated to the company his opinion that "at present the very foundations of the company's title are not undisputed." At other times however, the home authorities were averse to the taking of the initiative in testing the actual validity of the charter, leaving that to Canada or to private parties, if they should be so advised, and the law officers pointing out the mode of procedure in such case. But on the question of the boundaries the authorities were very pronounced. The law officers, in 1857, say, in regard to these, that to other "elements of consideration upon this question, must be added the enquiry (as suggested by the following words of the charter; viz.: 'not possessed by the subjects of any other Christian prince or state') whether, at the time of the charter, any part of the territory now claimed by the Hudson's Bay Company could have been rightfully claimed by the French, as falling within the boundaries of Canada or Nouvelle France, and also the effect of the Acts of Parliament passed in 1774 and 1791. Under these circumstances, we cannot but feel that the important question of the boundaries of the Hudson's Bay Company, might, with great utility, as between the company and Canada, be made the subject of a quasi-judicial enquiry" etc. Mr. Labouchere, in his very letter referred to by counsel, that of 22nd January, 1858, says: "With regard to the question of boundary, as distinguished from that of the validity of the charter, Her Majesty's Government are anxious to afford every facility towards its solution," etc.; and Earl Granville, in his letter above-mentioned, reminds the company that "the boundaries to its territory are open to questions of which it is impossible to ignore the importance."

‖ It was treated and named not as a colony but as a territory. See *ante*, p. 309, note *.

¶ They are far from being the same. In following the ever-varying sinuosities of the height of land, the line of 49° will be found not to be coterminous with it over any given space but to distinctly differ from it, and that—judging by the maps—over a range varying from 1½ degrees below to 1½ degrees above.

I have one more word to add with regard to the Award. Your Lordships have all the facts before you, and I submit with some confidence that there is not one tittle of evidence in support of the line of the Award.

I think it is proper that I should state this, and I will tell your Lordships the purport of it before I state it, as I do not want to do anything which your Lordships might not think proper. Before the Award was signed, the Arbitrators announced their decision, that is, their two points, and it was by arrangement, which I have, I think, a perfect right to state, subject to what your Lordships think, that this particular line was then agreed to. Your Lordships will allow me to state it. Mr. Mowat is present, who heard it. My learned friend, Mr. MacMahon is present, who heard it on behalf of the Dominion, and it was stated by Sir Francis Hincks to be the fact. If I may state it, I will tell your Lordships how that was.

The LORD CHANCELLOR.—Is there not some document in which Sir Francis Hincks says it?

Mr. MCCARTHY.—Yes.

Lord ABERDARE.—I thought he said each of the three Arbitrators arrived at the same decision independently of each other.

Mr. MCCARTHY.—He does. The point I am going to refer to is not on that exactly.

The LORD CHANCELLOR.—Where is the document?

Sir ROBERT COLLIER.—It is at page 109.[1]

Mr. MCCARTHY.—That is where it commences but that is not where the passage is. Your Lordships will find the passage I refer to at page 124, line 30.*

"The sole ground for the charge that they adopted a conventional or convenient boundary is, that the line connecting the north-eastern and south-western boundaries was adopted for the sake of convenience. The Arbitrators were guided in their decisions solely by Acts of Parliament, Proclamations authorized by Orders in Council, on the authority of Acts of Parliament, and international Treaties. They found in the Proclamation of 1791 that after reaching James' Bay the description proceeded thus: 'Including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada.'"

Then he goes on to give his argument:

"If the critics of the Award believe such language susceptible of the construction that it lays down a precise spot on the north-west as a boundary, then their charge might have some foundation; but the fact is that the language would have justified the Arbitrators in extending the boundaries of Ontario very considerably. They were strongly urged by Col. Dennis, one of the permanent staff of the Department of the Interior, after their decision as to the south-westerly and north-easterly boundaries became known, to connect the two points by a natural boundary, and being aware of the fact that the Albany River had been formerly suggested by the Hudson's Bay Company as a satisfactory southern boundary, they accepted it."

That, I believe, is perfectly correct. It was done by consent.

Mr. MOWAT.—Will you read the next paragraph?

Mr. MCCARTHY.—I will.†

Lord ABERDARE.—That they took that rather than what may be called a geographical line.

* Printed *ante*, p. 12, note†.

† The paragraph referred to is:

"It is not a little singular that the Award was promptly accepted by Ontario, although the only questions of doubt were decided in favour of the Dominion. Both on the west and north, the doubts were whether Ontario should not have had more territory."

Mr. McCarthy.—Yes. The effect of their Award is this, as your Lordships will see. They take the north-west angle of the Lake of the Woods. If the Hudson's Bay Company had any territory at all, their duty was to go to that territory. If they had no territory, their duty was to carry that line up to the Hudson's Bay itself. They, in point of fact, ignored all possible claims of the Hudson's Bay Company. Their Award is only based upon the theory that the Hudson's Bay Company did not own a foot of land.*

The Lord Chancellor.—How does that appear from this letter of Sir Francis Hincks?

Mr. McCarthy.—They assumed the north-east angle. That was Hudson's Bay.

The Lord Chancellor.—Do they or do they not say so?

Mr. McCarthy.—They do not say it in words.

The Lord Chancellor.—It is your theory?

Mr. McCarthy.—Yes. They assumed the north-east angle, which is on the Bay itself.† I am only stating the fact. What I am saying is that they ignored any Hudson's Bay property.

Sir Robert Collier.—That is not so.

Mr. McCarthy.—They say to that point, at all events, there is no Hudson's Bay property. Then they go to Albany River and say there is no Hudson's Bay property. I say the Award is based upon the theory that the Hudson's Bay Company had no territories between these two points, and further, if there had not been a conventional line, where would they have gone to?‡ The only way they could have drawn their line would have been northwards. Supposing Colonel Dennis had not made that suggestion, and the parties had not acquiesced in that suggestion, where would the Arbitrators have gone to?‡ Following the Quebec Act, it was to go north to the territory granted to the Merchants Adventurers of Hudson's Bay.§ So that the effect of that would have been to carry it

* The question of whether the Company had or had not any territory to the northward of the most north-western point of the Lake of the Woods did not necessarily arise, for by the combined effect of a series of Acts of the Parliament and the Crown—Statutes, Orders in Council, Proclamations, Commissions—the limits were drawn northward to the "boundary" line, otherwise the "shore" line of Hudson's Bay, and embraced "all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada." On the north there was thus no limit other than the shores of the Bay. On the west, although the extent of French Canada would of itself have justified an extension of the boundaries to the sources of the Saskatchewan, the arbitrators evidently considered themselves restricted, on various grounds (as to which see note to the Award in Appendix A hereto), to the most north-western point of the Lake of the Woods, up to which the line of the southern boundary was established conclusively and beyond controversy. From this point, northward to the "shore of Hudson's Bay," it was open to the arbitrators to adopt any one of three different lines: (1) a line due north, through the wilderness, which could not but have proved a most embarrassing and inconvenient one; (2) the natural boundary of Lake Winnipeg and the Nelson River, which may be supposed to have been the line the Duke of Newcastle had in view in his communication to the Company, of 5th April, 1864 (Joint App. 253-4); or (3) that of the English and Albany Rivers, the latter river favoured by the Company as a limit between themselves and the French (*Ib.* 562-4). As this third line was, of the three, the least favourable to Ontario, it did not rest with either the Dominion or Manitoba to object to it. Then, as a natural is preferable to an astronomical boundary, it is always permissible to adopt it, if no gross injustice to any of the parties is involved. The company themselves invoked the principle in this very controversy; for when, in 1701, the Lords of Trade and Plantations suggested to them the concession of the line 52½° to the French on the east side of the Bay, they proposed the East Main River in substitution, adding: "As to the company's naming of rivers as boundaries and not latitudes, the same is more certain and obvious, both to the natives as well as Europeans, and the contrary impracticable; nor can the latitude be so well laid down in that wild country, the Indians well knowing the one but not the other." (*Ib.* 563). With the motives which may have actuated the Crown and Parliament in ignoring, or denying, any of the alleged rights of the Company within the limits of the Award, we are not concerned: the fact suffices. But see *ante*, pp. 190, note †, 208, note *, 235, note *, 331, note ‡.

† There was no such assumption, for the Acts of authority already referred to carried the boundary to the north-east angle.

‡ Either due north, or by Lake Winnipeg and the Nelson River, to the Bay. (See *supra*, note *.)

§ But the Quebec Act was only one of the instruments or pieces of evidence governing the decision.

up to Churchill. That would have been the theory if there had not been that consent given.

The LORD CHANCELLOR.—I do not see that at all.

Sir MONTAGUE SMITH.—Was that by consent?

Mr. MCCARTHY.—Yes.

Sir MONTAGUE SMITH.—Between whom?

Mr. MCCARTHY.—Counsel for the Dominion on one side.

Sir MONTAGUE SMITH.—Why do the Dominion dispute it, then?

Mr. MCCARTHY.—They have to contend, on behalf of the Parliament, that the whole thing was *ultra vires*.* What I say is that there is not a single thing, so far as I can understand (I am speaking now of the west, my learned friend will address your Lordships on the other part), in favour of the Award upon the west,† and the theory of the Arbitrators would have carried them up to Churchill, or, at all events, to Nelson River, ignoring the whole of the Hudson's Bay territory completely between the Bay and the height of land, whether it be 100 leagues or 20 leagues.

The LORD CHANCELLOR.—You argue that to the south of the Nelson River the Hudson's Bay territory does not extend?

Mr. MCCARTHY.—What I mean is this. If it had not been for the conventional arrangement made.

Sir ROBERT COLLIER.—There was no conventional arrangement made.

Mr. MCCARTHY.—I am stating it in the presence of Mr. Mowat.

Mr. MOWAT.—I know nothing more than is here.

Sir ROBERT COLLIER.—Mr. Mowat denies that there was any such conventional arrangement.

The LORD CHANCELLOR.—They fix the south-westerly and north-easterly boundaries, and having fixed the south-westerly and north-easterly boundaries, they were saved some trouble by a suggestion from the Dominion that a natural boundary would be desirable, and they take the Albany River—not entirely on that ground, but because also they were aware of the fact that it had been formerly suggested. You may very fairly say upon that, that the only reasons stated for their taking the Albany River are those two.

Mr. MCCARTHY.—Yes, my Lord, I will state that.

Sir MONTAGUE SMITH.—This is an informal lecture, and not at all official.

Mr. MCCARTHY.—It is put in for what it is worth by both of us.

Mr. MOWAT.—You put it in.

Sir MONTAGUE SMITH.—But it is not official.

Lord ABERDARE.—As I understand, it is an explanation.

Mr. MCCARTHY.—Yes, it is an explanation.

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* Only as any other or different decision which the board of arbitrators might have come to might have been *ultra vires*, in the absence of the legislation promised by the Dominion Government; for by formal Order in Council of the 12th November, 1874, the Dominion agreed "that the determination of a majority of such three referees [meaning the arbitrators] be final and conclusive upon the limits to be taken as and for such boundaries," and further agreed to "concurrent action with the Province of Ontario, in obtaining such legislation as may be necessary for giving binding effect to the conclusions arrived at, and for establishing the northern and western limits of the Province of Ontario in accordance therewith;" but in the end, and notwithstanding the repeated urgent solicitations of Ontario, the Dominion Government neither asked for, nor obtained, the legislation referred to, thus breaking faith with the Province, which, on its part procured the passage of an Act such as was called for by the agreement. Although, however, the Award was not of legal binding effect in the absence of Dominion legislation, its findings were found to be practically correct, and were so subsequently adopted by the Lords of the Privy Council and by the Dominion Parliament.

† That the southern boundary of Upper Canada extended at least as far to the westward as the most north-western point of the Lake of the Woods was conclusively established by a view of the combined effect of the Act and Royal Commission of 1774, the Commission of 1777, the Treaty of 1783, the Commission of 1786, the Act, Orders in Council and Proclamation of 1791, and the Commissions from 1796 to 1835 inclusively. As to the limitary line northward from that point, see *ante*, p. 335, note *.

Sir MONTAGUE SMITH.—What is it, exactly? It is called a lecture.

Mr. MCCARTHY.—Yes; Sir Francis Hincks gives a lecture to explain his Award.

Mr. MOWAT.—A popular lecture.

Sir MONTAGUE SMITH.—A written paper?

Mr. MCCARTHY.—I was not present. He gave it as a lecture. I suppose it was a written lecture.

Sir MONTAGUE SMITH.—It was not official?

Mr. MCCARTHY.—No.

Sir MONTAGUE SMITH.—You say it was an apology for his Award?

Mr. MCCARTHY.—An explanation.

Sir ROBERT COLLIER.—The Award had been attacked anonymously in the newspapers and by those against whom the Award was, and he defends himself.

Mr. MCCARTHY.—That is it. I was stating what was the effect, and I say it is a fair argument for me to use, that if you take the north-west angle of the Lake of the Woods as the point of departure and follow the Quebec Act* you go north to the Hudson's Bay Company's land. Following that line where can you get north to the Hudson's Bay land? I submit with great confidence, that this Award is based upon the theory that the Hudson's Bay Company had no lands.† That is the effect of it.

Lord ABERDARE.—Would not it be that there was sufficient evidence for them of occupation and partial settlement by Canada of the country up to the Lake of the Woods?

Mr. MCCARTHY.—I am afraid I shall be repeating myself again and again.

Lord ABERDARE.—You say not.

Mr. MCCARTHY.—Yes, I say there was not a syllable of evidence to warrant it more than there is now.

The LORD CHANCELLOR.—Not more than there is now, certainly.

Mr. MCCARTHY.—Your Lordship will see the only pretence for it was the settlement at Albany River,‡ and Fort St. Germain I have dealt with. The other forts were south of the point. I say there is nothing to justify it, and I submit that the Award itself, having been objected to by the Canadian people in Parliament assembled,§ ought not to be taken as of any weight or as evidence against us in the ascertainment of the true line. The Canadian Government, contrary to the will of the Canadian people, managed this matter in a manner they did not approve of.‖ I submit it is not to be treated as of the effect of a judgment *prima facie* right. It is of no validity on this question. It has no effect or weight in itself.

For these reasons, I submit the contentions I have made before your Lordships.

The LORD CHANCELLOR.—I should like to ask you, if it is not inconvenient to you, whether, supposing we did arrive at the two south-westerly and north-

* But the Quebec Act is only one among many pieces of evidence, and it has to be read not alone nor apart from the others, but with them.

† See *ante*, p. 335, note*.

‡ The evidence is clearly to the contrary, as has been hereinbefore shewn; and see appendix B, hereto.

§ Parliament was not asked to deal with the question by direct vote upon the merits, and referred to it only incidentally, as in the Act 43 V., c. 36: "Whereas certain territory . . . is claimed . . . as being within the said Province, and whereas such claim is disputed," etc. It is not to be doubted that if, after the Award, the Government of the day had submitted it for the approval of Parliament, the same would not have been withheld.

‖ This is not shewn to have been really the case; it is, on the contrary, fair to assume that the temper of the people is not here properly gauged, as they subsequently, by their representatives in Parliament, passed a measure formally approving and confirming the findings of this very Award.

easterly boundaries—the north-easterly at Hudson's Bay and the south-westerly at the Lake of the Woods—you have anything to suggest as to the way the line should be drawn instead of following the course of the Albany River.

Mr. McCarthy.—No, my Lord, I am not authorized to make any suggestion.

The Lord Chancellor.—I mean you have nothing to suggest as to what the true line should be if those two data are arrived at?

Mr. McCarthy.—No, my Lord.

Mr. Christopher Robinson.—I represent the Dominion here. The position taken by the Dominion is substantially the same as that taken by the Province of Manitoba, and as far, therefore, as the facts are concerned, so far as all these geographical questions are concerned which my learned friend has discussed in detail, I do not propose to add anything to his argument. We have, of course, discussed the matter very much together, and what he has said embodies, I think, all we could find which we desire to represent to your Lordships upon these different questions. There is only one of them, therefore, and that a very short one, upon which it will be necessary, I think, to make any allusion to details. In the view of the Dominion Government, as I understand it, a good deal of what has been said here, and a good deal of what has entered into the argument, would be irrelevant, whether their view were right or wrong. Now, your Lordship will find at page 142* that when this question was first raised as between the Dominion and the Province of Ontario, the Dominion adopted the view that the boundaries of Ontario were the due north line and the height of land.†

* The despatch appearing at that place does not shew the fact mentioned in the text; that is shewn by the documents at pp. 329-331.

† In 1871, as the result of negotiations originating with Ontario, Commissioners were appointed on part of the Dominion and Province respectively, "to determine the boundary line between the Province of Ontario and the North-West Territories." The Province had proposed that joint instructions should be prepared for their guidance, and asked that a draft of the instructions proposed to be given by the Dominion should be submitted for the consideration of the Provincial Government. On a report of the Minister of Justice, Sir John A. Macdonald, approved by Order in Council of 12th March, 1872, a copy of the draft instructions was transmitted accordingly, as follows:—

Draft of Instructions to be given to the Commissioner appointed to act on behalf of the Dominion of Canada in the survey and location of the boundary line between the North-West Territories and the Province of Ontario, in conjunction with a Commissioner to be appointed by the Government of Ontario

"The boundary in question is clearly identical with the limits of the Province of Quebec, according to the 14th Geo. III., cap. 83, known as the 'Quebec Act,' and is described in the said Act as follows, that is to say: Having set forth the westerly portion of the southern boundary of the Province as extending along the River Ohio 'westward to the banks of the Mississippi,' the description continues from thence (*i.e.*, the junction of the two rivers) 'and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay.'"

"Having determined the precise longitude west of Greenwich of the extreme point of land marking the junction of the north and east banks respectively of the said rivers, you will proceed to ascertain and define the corresponding point of longitude of the intersection of the meridian passing through the said junction with the international boundary between Canada and the United States. Looking, however, at the tracing enclosed, marked A, intended to illustrate these instructions, it is evident such meridian would intersect the international boundary in Lake Superior. Presuming this to be the case, you will determine and locate the said meridian, the same being the westerly portion of the boundary in question, at such a point on the northerly shore of the said lake as may be nearest to the said international boundary, and from thence survey a line due south to deep water, marking the same upon and across any and all points or islands which may intervene; and from the point on the main shore, found as aforesaid, draw and mark a line due north to the southern boundary of the Hudson's Bay Territory before mentioned. This will complete the survey of the westerly boundary line sought to be established.

"You will then proceed to trace out, survey and mark, eastwardly, the aforementioned 'southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay.'"

"This is well understood to be the height of land dividing the waters which flow into Hudson's Bay from those emptying into the valley of the great lakes, and forming the northern boundary of Ontario; and the same is to be traced and surveyed, following its various windings, till you arrive at the angle therein between the Provinces of Ontario and Quebec, as the latter is at present bounded; having accomplished which, the service will have been completed." * * * * (Joint App., 330; Sess. Papers, Ont., 1873. No. 44, p. 15.)

Here was the first official statement of the claim of the Dominion in regard to the boundary, a view adopted also subsequently by Manitoba, and contended for by both to the end. By an Order in Council

The LORD CHANCELLOR.—The wish which has been expressed to see if possible maps earlier than the dispute, shewing the division of Upper and Lower Canada will be remembered.

Mr. ROBINSON.—Oh, yes.

Lord ABERDARE.—I have despatched a letter to the Geographical Society asking them to send down any maps which they may have.

Mr. ROBINSON.—I am very certain that many of these maps may be found, but whether they may be had here I am not sure of course. Your Lordship will find at the very outset, as soon as the question was raised as between the Dominion and the Province of Ontario, and when the question of settling it by commissioners was first raised, the Dominion asserted as the boundaries of Ontario what may be shortly described as the due north line and the height of land. Now, the determination of this question must depend, after all, altogether upon the construction of the Quebec Act.

The LORD CHANCELLOR.—Yes.

Mr. ROBINSON.—Because, as by the Quebec Act it was in 1774, so it is now. That Act has never been repealed and has never been changed.* We have nothing therefore to do but to endeavour in the light of such facts as are admissible in evidence, and as are now known to your Lordship, to place a construction upon that Act. Now, it is also the fact that really the only thing which it is necessary to do is to settle the construction of the two courses given in that map; that is to say, what is the meaning of the words, "and northward to the southern boundary of the" Hudson's Bay territory. The boundaries go along the Ohio after getting to the Ohio. I need not at this moment read to your Lordships the different courses by which you get to the Ohio. But the boundaries go to the Ohio; they then go westward, along the Ohio, to the junction of that river with the Mississippi, and "northward" to the southern boundary of the territory granted to the Hudson's Bay Company. Now, the first question is, what is the meaning of that term "northward"? The Dominion Government have asserted and have always maintained the view that "northward" there means due north. In the first place, your Lordships will remember that that point had been decided in 1818 in the De Reinhard case. That case, whether the decision of it was right or wrong, has never been judicially questioned, still less overruled. I do not think your Lordships will find that the Monk case, to which my learned friend, Mr. Scoble, referred, does in any way affect that case, because it related to the territory of Athabasca, which really has nothing to do with what we are now discussing.† We find therefore, by the decision of the Court, in a case of the utmost importance, in which life and death was concerned, that that point had been settled, and it was not for the Dominion government to concede that the decision was wrong.

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of 25th March, 1872, Ontario declares, for the information of the Government of Canada, "that the Province of Ontario claims that the boundary line is very different from the one defined by the said instructions, and cannot consent to the prosecution of the Commission for the purpose of marking on the ground the line so defined, and that the Commissioner appointed by the Government of Ontario should be instructed to abstain from taking any further action under his Commission." And so the question practically rested until the initiation of the proceedings which led to the Award.

* Ontario contended that it was to be considered as explained and interpreted—and its boundaries, it might be, enlarged—by subsequent acts of authority, particularly the Royal Commissions, 1774-1835, and the Statutes, Orders in Council, and Proclamation, of 1791. To these, effect was given in arriving at the Award; and the findings of the Award have since been adopted by Her Majesty in Council and by the Parliament of Canada.

†The case referred to was that of Conolly *v.* Woolrich, tried in 1867, in the Superior Court of Quebec, in which it was judicially decided that the regions of the North-West, as well as the Athabasca country, were excluded from the limits of the Hudson's Bay Company, and were in the occupation of the French, and belonged to the Crown of France. The case cannot therefore be said to have no bearing upon the present matter. (Joint App., 691.)

Lord ABERDARE.—Was it settled by a court competent to settle it?

Mr. ROBINSON.—It was settled by a court which had a right, just as every court has an incidental right, to try such question.

The LORD CHANCELLOR.—Was it settled by acquitting the accused?

Mr. ROBINSON.—No, it was settled by convicting him.

Sir BARNES PEACOCK.—The petition had not got to the Crown within three years, and then they say, considering the time he has been kept in prison, and remembering all the circumstances, we release him.

The LORD CHANCELLOR.—Was it an Upper Canada or Lower Canada court?

Mr. ROBINSON.—A Lower Canada court.

The LORD CHANCELLOR.—What is the date?

Mr. ROBINSON.—1818. He was tried under the statute.

Sir BARNES PEACOCK.—Under the Act 43 Geo. III, chapter 138. I cannot very well understand it. The Commissioners were to try whether the offence was committed out of the boundaries of Upper or Lower Canada, or in the territories of either.

Lord ABERDARE.—Therefore it was they convicted, I suppose. Is that at what is called the Dalles?

Mr. ROBINSON.—Yes.

Sir BARNES PEACOCK.—I think the Chief Justice treated the boundary of Lower Canada as the boundary of Upper Canada. You will see what he says. He says: "A line drawn due north from the head of Lake Temiscaming till it strikes the boundary line of Hudson's Bay" is the boundary of Upper Canada.

Lord ABERDARE.—The eastern boundary of Upper Canada.

The LORD CHANCELLOR.—Where is the judgment?

Sir BARNES PEACOCK.—At page 679 the Chief Justice says this. I think he makes a mistake. He was trying whether it was committed either in Upper Canada or Lower Canada. This was under a commission issued by Quebec. That was Lower Canada.

Mr. ROBINSON.—If I understand and recollect the facts of that case rightly, the jurisdiction of that court to try only arose provided the crime was committed out of the Province.

Sir ROBERT COLLIER.—Yes, in Indian territory. The Chief Justice says he is accused of committing a crime in Indian territory. Therefore, if he committed it in Canadian territory, I suppose he could not have been tried by that indictment.

Mr. ROBINSON.—That was it, my Lord. The first words of the Act shew quite plainly what its purpose is (page 406): "Whereas crimes and offences have been committed in the Indian territories, and other parts of America, not within the limits of the Provinces of Lower or Upper Canada, or either of them." It was to try such cases that jurisdiction was given by this statute to this court in Lower Canada. It was therefore a condition precedent to the jurisdiction that they should say the place where this murder was committed was outside the limits of Upper Canada.

Sir MONTAGUE SMITH.—And I suppose there was an objection to the jurisdiction.

Mr. ROBINSON.—Yes, there was an objection to the jurisdiction, which they then discussed at length.

The LORD CHANCELLOR.—The Chief Justice says, at line 19: "a line drawn due north from the head of Lake Temiscaming till it strikes the boundary line"—that is the eastern boundary.

Mr. ROBINSON.—Yes, that is the eastern boundary.

Sir BARNES PEACOCK.—That is the boundary of Upper Canada.

Mr. ROBINSON.—That is a mistake; that should be eastern. I noted that in my book as a mistake. It is printed western. That has confused your Lordship. I have no doubt it is clearly wrong.

Sir BARNES PEACOCK.—What he wanted to shew was that this offence was committed out of the jurisdiction of either Upper Canada or Lower Canada.

Mr. ROBINSON.—Exactly

Sir BARNES PEACOCK.—He did not shew that by laying down the eastern boundary. He ought to have gone to the western boundary to shew it was committed out of the jurisdiction of Upper Canada. The Act says: "to try offences not committed within the limits of either of the said provinces."

The LORD CHANCELLOR.—It is quite clear from that and the next page that the learned judge did decide that the line drawn due north from the confluence was the western boundary.

Mr. ROBINSON.—Yes.

The LORD CHANCELLOR.—And that he went upon that ground. Suppose we do not view it in that way.

Mr. ROBINSON.—Then the decision will be the other way.

The LORD CHANCELLOR.—Of course, we shall give due weight to such opinion, but it is manifest that it does not rest upon any materials different from those which we have to deal with.

Mr. ROBINSON.—In no way.

The LORD CHANCELLOR.—And that it cannot be a conclusive authority.*

Mr. ROBINSON.—In no way. I am not here for a moment to contend for that position before your Lordships. That is not the view with which I pointed it out to your Lordships, or referred your Lordships to it, for a moment. I am only pointing out the position of the Dominion, and the grounds they had before them for the view they asserted. Those grounds will be decided by your Lordships of course on your own opinion to be either right or wrong. I am only pointing out that when the Dominion first came to consider this question, and saw that the question of the western boundary of Ontario and the southern

* In regard to the De Reinhard case, it is to be noted that Upper Canada was not represented upon the proceedings; that the then Chief Justice of Upper Canada did not subscribe to the decision, but on the contrary, held that the western limit of Upper Canada was co-extensive with that of French Canada (*ante*, p. 138); that the decision was never recognized in Upper Canada before its union with Lower Canada, nor by the Province of Canada afterwards; that since that decision a mass of evidence has come to light which further supports the contention of Ontario; that the court itself which gave the decision appears to have had doubts as to its correctness in respect of the boundary, for Chief Justice Sewell, in delivering judgment, said: "It is alleged that we have put a construction as to the boundaries of His Majesty's ancient Province of Quebec which is erroneous, and that we have followed up that misconstruction by misdirecting the jury as to the limits of the Province of Upper Canada. . . . The Court have taken upon themselves to decide the limits of Canada. Original jurisdiction relative to the territories of the King, is in the King and his Council. In this dependent province, nevertheless, we have been compelled to give a decision upon the question, not from any wish on our own part, but because it was brought before us, and there was no evading it. The power of deciding finally is at home; the question will be taken before the King and his Council, and in deciding the limits of Upper Canada they will either confirm or reverse our decision according as we have done right or wrong. As to any consequences that may result from our error, if error we have committed, they will be obviated by the supereminent authority to whom the question is referred." (Report of the Trial, pp. 626, 645-7.) And in the case of McLellan, tried as an accessory shortly after De Reinhard, under the same commission, the same Chief Justice, laying down the boundary as in the other case, adds in his charge: "This question will be submitted to the decision of His Majesty in Council, as it is only by His Majesty, with the assistance of his Council, that the boundaries or limits of His territories can be legitimately and permanently defined. . . . . If ultimately our judgment, or rather decision, should be set aside by the competent authority, any inconvenience which may result from our erroneous decision will assuredly be obviated," etc (Joint App. 685); that the execution of the sentence on De Reinhard was respited over from time to time to procure a decision of the home authorities "in respect to the court's competency of jurisdiction" (Mr. Administrator Monk to Earl Bathurst, *Ib.* 681; Lord Dalhousie to the same, *Ib.* 683); that the difference in point of law was referred to "the Home Department" (*Ib.*); that De Reinhard was set at liberty: "His Majesty has been graciously pleased to grant to the prisoner a free pardon" (*Ib.* 684); that, anyway, the decision of the Court was, in terms, that the place of the murder, the Dalles, was situate "in the Indian Territory," and therefore not within the bounds of the Hudson's Bay Company's territory.

boundary depended entirely upon the construction of the Quebec Act,* of course it was a most essential element in their consideration, that that statute had been construed by a Lower Canada court, on a trial for murder, in 1818, and that that decision had never been judicially questioned.

The LORD CHANCELLOR.—Were the commissions to Sir Guy Carleton before the Court at that time? I don't see any reference to them.

Mr. ROBINSON.—I do not see that there were any.

Sir MONTAGUE SMITH.—The judge seems to have taken a decided view that "northward" must mean due north.

Mr. ROBINSON.—Under the circumstances.

Sir MONTAGUE SMITH.—The judge thought it was so plain a construction that he need not go any further than the language of the Act itself. He said "northward" means due north, and he has a discussion with a surveyor who takes a different view.

Mr. ROBINSON.—Yes.

Sir MONTAGUE SMITH.—But of course the judge had to construe the Act, and that was his construction.

Mr. ROBINSON.—Yes, that was the construction.

Sir MONTAGUE SMITH.—He does not give any reason for it, other than that the words mean it.

Mr. ROBINSON.—I cannot pretend to say any reasons were given beyond what we have in the report.

Sir MONTAGUE SMITH.—It must plainly mean that.

Mr. ROBINSON.—Yes. At all events that was his opinion expressed in his judgment.

Sir MONTAGUE SMITH.—That was the whole amount of it? Of course you have his authority in your favour.

Mr. ROBINSON.—Yes. I can say nothing more. I cannot push a thing beyond its legitimate strength; but your Lordship of course will remember that reporting in those days was a very different thing from what reporting now is, and although I cannot pretend to say there was more, when more does not appear, I think it very likely.

Sir MONTAGUE SMITH.—This is very fully set out. It seems to be the fixed view from the beginning that "northward" meant due north.

Mr. ROBINSON.—There is no doubt about that.

Sir MONTAGUE SMITH.—And that he had no discretion.

Mr. ROBINSON.—He thought that was the proper construction to put upon the Act; not because as a general rule "northward" always means due north, but because "northward" as found there, taken together with the context, should be construed to mean due north.

The LORD CHANCELLOR.—Whether or not the words ought to be construed in any other way than the way in which the learned judge construed them, I cannot undertake to say, but surely you would not deny that the words are such as to admit of extrinsic facts?

Mr. ROBINSON.—No; I should certainly not.

Lord ABERDARE.—And that one of those extrinsic facts was the Act of 1774,† which was to provide a proper method for the administration of civil government?

Mr. ROBINSON.—Unquestionably.

* See *ante*, p. 339, note *.

† Printed *ante*, p. 34, note.

Lord ABERDARE.—For this purpose it was just as necessary to go up to the Mississippi ?

Mr. ROBINSON.—That is a question of fact, upon which I propose to say a few words to your Lordships.

Lord ABERDARE.—You are prepared to shew the limit between that line and the Mississippi itself, was provided for otherwise ?

Mr. ROBINSON.—No. I am prepared to shew the majority of the important settlements were taken in by the due north line.* I cannot go further than that.

Lord ABERDARE.—Even down from the junction of the Ohio for a considerable way northward ?

Mr. ROBINSON.—Yes.

The LORD CHANCELLOR.—If you take a due north line it will leave out a not inconsiderable part of Lake Superior ?

Mr. ROBINSON.—Yes. Then, will your Lordship permit me to come to the settlements of the Illinois that are spoken of. I will come to that afterwards, but I suppose my duty now is to endeavour to shew that position was correct. It seems to me that perhaps the fairest way to construe an Act of that sort is first to take the enacting part, to see what the enacting part taken by itself will fairly mean, and then to see whether there is anything in the preamble, taken in connection with the surrounding circumstances, which are properly admissible in evidence to effect that construction.

Now if we take the words of the enacting part first, at page 366 of the Joint Appendix, they go, first, to the junction of the two rivers, then, " northward to the southern boundary of the territory granted to " the Hudson's Bay Company.

The LORD CHANCELLOR.—It is not quite to the junction of the two rivers.

Mr. ROBINSON.—If I am wrong in that, I said it for the sake of shortness; but it is at all events " westward to the banks of the Mississippi."

Sir ROBERT COLLIER.—" And northward to the southern boundary."

The LORD CHANCELLOR.—It is not quite immaterial to notice that in several places before, they speak of following " the said bank."

Mr. ROBINSON.—No, my Lord; that is important.

Lord ABERDARE.—And that whereas when they are speaking of the other rivers you have the word " bank," when you come to the Mississippi, although we do not claim the further bank of the Mississippi,† you have the word " banks."

The LORD CHANCELLOR.—I see it says that the line is to go " to a point in forty-five degrees northern latitude, on the eastern bank of the River Connecticut keeping the same latitude directly west."

Mr. ROBINSON.—Yes; it is so. I have not overlooked any of those things in my consideration of this statute, and I only desire to point out to your Lordships my argument upon it, whatever weight may attach to it.

Lord ABERDARE.—As long as we deal with this ground of the due north line, the question of the height of land is of very little consequence.

Mr. ROBINSON.—No. If we get the due north line, we shall get it to the southern boundary of the territory, and then we shall have to consider where that comes to

Sir MONTAGUE SMITH.—Your construction ignores the height of land as a boundary.

* All the settlements on the Mississippi, and all those of the Illinois (with one exception), whether on the Mississippi or not, were excluded by the due north line.

† See *post*, p. 344, note *.

Mr. ROBINSON.—No; because we must follow the due north line until we get to the height of land. The due north line is marked on the map and the effect of it is very plain to be seen there.

At all events, this course goes along the bank of the Ohio "westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers" of the Hudson's Bay Company. I cannot say myself what particular effect ought to be attributed to the use of the term "banks" instead of "bank," nor can I say whether it was intended to have any effect or not. We do not claim both banks, as your Lordships know, and it is quite within the bounds of possibility that it is a misprint. But I am not prepared to say that it is so in any way, because I do not know. All I say is, I cannot myself found any definite argument upon it either pro or con.* If your Lordships were aware—as we are unfortunately—how many volumes have been published upon this subject, and how very small a part of the literature and discussions upon this subject is the enormous mass of evidence we have placed before you, you would see that it is more difficult than in an ordinary case to endeavour to extract what is relevant. Our own impression, representing the Dominion, is, that a vast mass of what is here is wholly irrelevant to the settlement of the question. But it is neither our wish, nor is it in our power to exclude anything which on the part of Ontario† was thought to be relevant or right to be brought before your Lordships; and what has been brought before you, together with the effect of it, has been discussed as fully and as strongly by my learned friend as it would be possible for me to put it before you, as far as relates to the details of these matters, and therefore I am not going to repeat one syllable of that.

But now I will ask your Lordships, first, to consider what would that course, taken by itself, mean without any assistance. It goes to a certain point without saying what that point is, and that is "northward" to the Hudson's Bay territory. Supposing a surveyor were directed, the day after the Act was passed, to take that Act in his hands and draw that line—is there any doubt what that surveyor would do? I do not contend that "northward" always must mean due north; I do not contend that, of itself, it is identical with "due north," in meaning, in any way. It may mean somewhat to the north-east; somewhat to the north-west; but I do not think there can be any reasonable doubt as to what a surveyor would have done, if, the day after the Act was passed, it had been placed in his hands, and he had been told to draw the line that that Act contemplates. He would simply have placed himself at the junction of those rivers, on whichever bank it might be, and he would have said—Where is Hudson's Bay

* The contention of Ontario respecting this point—that the word "northward" in the Act had reference to the extension in that direction, along the river to its source, of the whole tract of territory dealt with, and that therefore "banks" might be used with propriety—is noticed, *ante*, p. 186, note†; to which may here be added another reason for the use of the plural term "banks," viz., that the treaty of 1763 provided for the free navigation of the Mississippi, in these terms: "Provided that the navigation of the Mississippi shall be equally free as well to the subjects of Great Britain as to those of France, in its whole breadth and length, from its source to the sea," etc., (*ante*, p. 36, note). Great Britain had, thus, in the stream, a title or interest jointly with France, which extended to the far bank, and in transferring to the Province of Quebec the territory which was within its newly settled limits, the use of the plural term "banks" seemed therefore necessary in so concise a description. If this be taken to be a true explanation of the use of the term, then every argument in support of the "due north" theory falls to the ground, for the absurdity of two separate and distinct due north lines is presented to us—one starting from the eastern, the other from the western, bank of the Mississippi.

† Not on the part of Ontario alone, but on the part of Manitoba also, and of the Dominion. It was a Joint Appendix, agreed to as such not only by each of the Provinces but also by the Dominion, whose agents took an active interest in its arrangement, and in excluding such papers (and published annotations of papers) as were objectionable in their view. Such documents as were so excluded from the Joint Appendix, were put in in the separate appendices of Ontario and Manitoba respectively. But the Dominion had at that time submitted to be party to the reference, a position from which it subsequently receded.

territory? Well, unquestionably, it is—somewhere—to the north, and he would have drawn, I suppose, the shortest straight line to that territory. That, I suppose, is hardly capable of dispute.

The LORD CHANCELLOR.—I am not so sure of that. I can quite imagine two surveyors taking two different views upon such a subject as that.

Lord ABERDARE.—And I can quite understand a person not being a surveyor looking at the whole of the facts together.

Mr. ROBINSON.—Quite so.

Sir MONTAGUE SMITH.—Mr. Saxe took a different view and took it strongly.

Mr. ROBINSON.—Not of the single proposition I have stated. And I am not stating that proposition as involving the whole case. I say if that stood alone, and without any extraneous considerations, there is no question of what a surveyor would do. I think it would be almost as simple as if your Lordship told me to draw a line from the point where I stand, northward to the bookcase, I should unquestionably draw the shortest line which would go from this spot to that bookcase. That I say then would be the first meaning of the Act.

The next question is, is there anything in the statute, and in the circumstances which have been brought to your Lordship's attention, to shew that construction ought not to be adopted? My Lords, there is no want of American authority, at all events, for the proposition which is the only proposition of law for which I contend—that "northward," taken by itself, means the north, if there is nothing to alter or change that direction. I find in the case of Jackson, on the demise of Clarke *v.* Reeves (3 Kane's Reports, page 293), a case decided in 1805 in the court of which the late Chancellor Kent was then chief justice, a man whose name stands in that country as a very high authority.

The LORD CHANCELLOR.—And here also.

Mr. ROBINSON.—He is called in some books I have seen, the Blackstone of America. He was the chief justice of the court, and Thompson, justice, in laying down the law there, as to the effect of a patent granted in 1688, conveying an enormous quantity of land, called the Catskill patent, said the courses are "northward, southward, eastward and westward," and it is a settled rule of construction that when courses are thus given you must run due north, south, east and west.

Sir MONTAGUE SMITH.—What are the precise words of the patent?

Mr. ROBINSON.—The general features of the case were these. There was a patent called the Catskill patent, which conveyed five great plains by name, together with the woodland adjoining the same, extending for four English miles round the said plains—that is to say four English miles from the said plains eastward; four English miles from the said plain northward; four from the said plain westward; and four from the said plain southward.

The LORD CHANCELLOR.—Were the plains rectangular blocks?

Mr. ROBINSON.—I think not; but I was going to refer your Lordship to another set of cases, which would clearly make out that northward would not be held to mean due north in every case. Without reading it all to your Lordships in detail, I will refer your Lordships to an authority where the same proposition is adopted—the case of Brendt on the demise of Walter *v.* Hogden, 1 Johnson, page 156, where the same chief justice presided over the court. There it is said that the course was "thence eight miles more northerly." The word "northerly" there was construed as meaning due north. It was said there with regard to the course, "thence eight miles more northerly, there being no object to control it, it must be a due north line." And there are one or two other cases in which the same general doctrine is expressed.

There is a set of cases, in Kentucky chiefly, which, I think, furnish a very good illustration of a different rule. There was a custom in early days in that State, apparently of making an entry of a claim, that is to say entering your claim for the pre-emption of certain territory, and claims were entered for certain territory of so many miles along a creek, and then saying "northward for quantity." There, it was held that the term northward must yield to the rule which required such blocks to be rectangular. They said "the term northward" is there used simply to decide the side of the creek from which the line runs; because, if the creek is running east and west and you claim four miles along the creek, you must shew whether you go northward or southward for quantity, because it is necessary to shew which side of the creek the land is lying upon, but they said that does not mean that you must go due north, because there is another rule, which runs in conflict with that, which says that the blocks are to be rectangular, that is to say, that the blocks are to run at right angles to the stream upon which they lie. I will refer your Lordship to those cases, and to one or two more cases laying down the general rule for which I have contended—*Garwin* v. *Dean*, 115 Massachusetts, page 577; and *Howard* v. *The College of the Holy Cross*, 116 Massachusetts, page 117; that case says "southerly is not necessarily due south." There, there were definite boundaries, and it was not construed to mean due south. Other cases to which I would refer your Lordship are, *Seaman* v. *Hogoboom*, 21 Barber, page 398; *Craig* v. *Hawkins*, 1 Bill, page 54; and *Calk* v. *Sterling*, in the same volume, at page 122.

It is said, however, that looking at this description, taking it as a whole, and taking it in connection with all the circumstances, "northward" here should be construed "along the bank or banks of the Mississippi." Now the first thing to be remarked upon this, as your Lordships pointed out, and as it is made the basis of a great many of the opinions which have been expressed upon this, is this: When the Legislature wished to say that they went along the banks of a river they said so. In the very preceding sentence they say that the line shall be "from thence along the said northern and western boundaries of the said province, until the said western boundary strike the Ohio, but in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at the point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania; and thence, by a right line, to the said north-western angle of the said province; and thence along the western boundary of the said province, until it strike the River Ohio; and along the bank of the said river westward."

That is a familiar argument as applied to the construction of wills, that when you find an expression familiar to the person writing, and when you find that that expression, although appropriate if the contention is such as is contended for, is omitted afterwards, it is a reasonable argument at all events that it was not intended to use it. At all events, just in the same line they do use the words "along the bank of the said river [that is the Ohio] westward," and there they furnish a good illustration of what the word "westward" must mean, because nobody would contend that it means due west, where the bank of the Ohio went otherwise than due west. Then, in several places they speak also of going along the banks of a lake, shewing that when they desired to go along the bank, either of a lake or of a river, they said so. It is perfectly fair to point out also, that in another place, where due west was meant, it was so stated.

We have now to consider what were the circumstances under which this Act was passed. So far as one can judge, I should think it probable that Mitchell's map was the one which was then referred to. I say that, because it is a map

published in 1755. It is a map, which from the certificate upon it, I should infer to be authorized by those who would probably be supposed to know best, and to shew what they believed to be the geographical features of the country at that time. I am not aware of any other map between 1755 and 1774, which would have been at all likely to be used by way of substitution for Mitchell.

The LORD CHANCELLOR.—Is it not too much to assume that there is any implied reference to any map at all? You cannot import that into this document for any purpose.

Sir MONTAGUE SMITH.—No; I do not think you can.

The LORD CHANCELLOR.—Was that the best map that they knew?

Mr. ROBINSON.—I say nothing more than this, that those who drew the statute—and we know that the statute was the subject of a good deal of debate—consulted the best maps that they could, that were in existence at the time. I cannot say any more than that. It is almost impossible to suppose that this boundary of the statute, involving the important consequences that it did, would have been drawn without reference to the best maps that could be found, and so far as one knows, Mitchell's map was the best. Now, if Mitchell's map is referred to, the first observation which strikes us is, that the source of the Mississippi was then unknown. It is stated in Mitchell's map that it was unknown. It is stated in the same map that the source was supposed to be in about latitude 50, and, I think, longitude 106; although it was unknown, that was the best conjecture they could form. They point out where they supposed its source to be.

Now, one of two things is very certain. In the first place, with regard to that description, as applied to the then course of the Mississippi, it would be more correct to say north-west—the course of the Mississippi there would have been more accurately described by the term north-westward than by the term northward. The general course of the Mississippi, by Mitchell's map, went more north-west than northward.*

Then, it has been said in many discussions in this case, that it would not go according to Mitchell's map—that it was supposed to be then Hudson's Bay territory; but one argument we certainly are entitled to have. If we lose strength in one way, we certainly gain it in another. If my friends on the other side contend that the legislature intended to go to the source of the Mississippi, I suppose it would not be doubted that the only thing you would have to do when you got there, if the source did not go to the Hudson's Bay territory, would be to go northward, and get to it as soon as you could.† But it is impossible to contend that the Hudson's Bay territory was limited, in the way they had contended, by a few posts along the shore, and then that the legislature, when they

* There is no evidence whatever to support the assumption that Mitchell's map was referred to. The Cavendish report of the debate indicates that no map at all was before the Commons' Committee, in which the description was amended in important particulars. We are left to pure conjecture as to what maps, if any, were before the Lords, in whose house the bill originated. But that they would not be restricted to Mitchell's, if it was at all before them, is clear from the Notes on Maps, in evidence before the Board in the Ontario Appendix, which counsel has overlooked. No less than seven or eight maps there described, running in date from 1743 to 1773, shew the sources of the Mississippi as lying somewhere to the southward of the Lake of the Woods. (See *ante*, p. 185, note*.) For this part of the description a map was scarcely required by the Lords' Committee, for, as they sent it to the Commons, it stood: "All the said territories, islands and countries . . . extending southward to the banks of the River Ohio, westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the" Hudson's Bay Company. The Commons altered the first portion of this description, by setting out a line for the southerly boundary by metes and bounds, but left the remainder intact. (*Ante*, p. 42, note.) As to the position taken by Ontario on this point, see *ante*, pp. 185, note*, 186, note†.

†The contention of Ontario was, that given the Mississippi to its source as a boundary, and there being no definition of the southern boundary of the Hudson's Bay Company's territory, and a question of bringing the French settlements of the North-West within the Act, the description in the Act would sufficiently answer the purpose.

drew this description, intended that they should get to the source of the Mississippi eight hundred miles from the shore.

The LORD CHANCELLOR.—The other side certainly mean that something more of the territory was granted to the Hudson's Bay Company than merely the forts along the shores.

Mr. ROBINSON.—Yes, of course, it goes a little further. The addition of eight hundred miles would, however, be a very serious addition. I think the source about eight hundred miles from the shore was the source as they understood it.

Then the next and by far the most important point is—does the preamble shew that in order to fulfil the intention of the Act, it was necessary to go along the Mississippi? It is said to be so, because in the preamble of the statute it is recited, that "by the arrangements made by the said Royal Proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said Treaty, was left without any provision being made for the administration of civil government therein;" and it is said, and I think it is said fairly, that the intention of this statute was to put an end to that difficulty. I do not think that that can be fairly denied, but we have now to see what those settlements were. In the first place, your Lordships will remember that by the proclamation of October, 1763, the Province of Quebec had been formed with a boundary very, very far to the eastward of that given by the Quebec Act. That boundary I think, speaking generally, comes down to a line drawn from the easterly shore of Lake Nipissing to nearly the meridian of Prescott on the River St. Lawrence. It is marked on several maps, and your Lordships will see that between that limit and the due north line, most of the important settlements beyond all question which were left and inhabited by the French were to be found.

The LORD CHANCELLOR.—There were a good many forts. [*His Lordship read out the names of several forts.*]

Mr. ROBINSON.—I am not going into the smaller posts at length, but I am only desirous of pointing out to your Lordships, that within the line we contend for, or to the east of that line, you will find given the most important of these settlements, that is Detroit.

Sir MONTAGUE SMITH.—You say there are some settlements on the other side, but not so important.

Mr. ROBINSON.—A few, but not so important. What I say is, that they would have thought of those settlements only which they desired for their government, and I am going to shew your Lordship that there were abundant settlements included within the line which we claim, to satisfy the objects of the Act. That is all I can do It is impossible to say there were none beyond. If your Lordship will refer to Governor Pownall's account of French Posts for instance, at page 602, that was an official account stating the settlements there in 1756.* I am stating the settlements in the country which would be east of the due north line, and between that and the line established by the proclamation of 1763. He says, "There is a fine settlement at Detroit, of near two hundred families, a better still at St. Joseph, of about two hundred." Now, that, no doubt, is the St. Joseph at Lake Michigan. The only other St. Joseph that I know of is on the St. Claire River. Those are the two most important settlements there. He says he cannot speak particularly about the Illinois forts.

* Pownall's is an English account, and is official only in the sense that he held an official position and made his report to the Duke of Cumberland. His statement is confessedly incomplete from lack of information: "I have not been able yet to get an exact list of the forts in Canada;" "As to the posts in the

The LORD CHANCELLOR.—Those are what we are not concerned with I think.*

Mr. ROBINSON.—What I proposed to shew your Lordship, shortly, was first the posts and settlements which would be included in the due north line, and next those which would be excluded, so far as I know. Governor Pownall's account I have referred to. In the Ontario Appendix, at page 25, your Lordship will find what is the French account,† which must have been written about 1757, I should say.

The LORD CHANCELLOR.—I am afraid we must interrupt you here.

[*Adjourned to to-morrow, 22nd July.*]

SIXTH DAY.

TUESDAY, 22nd July, 1884.

Mr. MOWAT.—Your Lordships asked for maps yesterday. One of the books I brought here from Canada, by Hugh Gray, contains such a map, of the date of 1809, and shews Upper Canada as extending to the limits we claim.

The LORD CHANCELLOR.—Will you let us see that? [*The map was handed to their Lordships*]

Mr. MOWAT.—There are two or three maps in that book [*meaning Charlevoix' History*] which have not been mentioned, and which may throw some light upon it. One is No. 68 of the Notes on Maps.

The LORD CHANCELLOR.—Of course we do not assume this map [*referring to that in Gray's book*] to be of authority, but it is dated in 1809. It seems, as far as I can form an opinion, to mark the dividing line between Upper Canada and Lower Canada by this dotted line. Is that so?

Mr. MOWAT.—Yes, my Lord.

The LORD CHANCELLOR [*to Mr. McCarthy*].—Do you agree?

Mr. MCCARTHY.—I think so. Of course I have not seen this before.

The LORD CHANCELLOR.—The line of division goes through Lake Temiscaming.

Lord ABERDARE.—Then, *valeat quantum*, it seems to claim up to the Albany as Upper Canada, just as this, on that side, is Lower Canada.

The LORD CHANCELLOR.—It may be of no authority whatever, but as a matter of fact it does seem to carry Upper Canada up to the Albany.

Mr. MCCARTHY.—It seems to carry it up to New South Wales.

Illinois country, I am not able to describe them particularly." But he gives a list of some of them: "The posts were, in 1752, Caskaskias, Fort de Chartres, Village de St. Philip, Prairie de Rocher, Cahokias, Village de Ste. Genevieve. . . Mr. Vaudreuil thinks Kaskaskias is the principal, as it is the pass and inlet of the convoys of Louisiana, as also those of Canada, and of the traders and hunters of the post Detroit, and that of the greatest part of the savage nations." After referring to the settlements at Detroit and St. Joseph, as set out in the text, he informs us that there is "a fine one at St. Antoine." This place which was on the Upper Mississippi, was only one of several in that quarter; another being Prairie du Chien (Fort St. Nicolas), which had been a place of considerable importance in the time of Nicolas Perrot, and had so remained continuously to our own day. All the places thus named were west of the due north line, and had a very large population. Pownall says of the French forts generally: "Most of these forts have fine settlements around them, and they do entirely support themselves." Outside of all this, it would seem that the commanding position of the Illinois, the agitation there carried on, prior to 1774, for a separate form of civil government, and the representations of the inhabitants to the home authorities, were not unimportant factors in the promotion of the Act of 1774, and the extension of the boundaries to the line of the Mississippi. (See *ante*, p. 187, note*; and for further particulars, Joint App. 359, *et seq.*)

* The preceding note shews that they were an element of great importance in the determination of the westerly boundary.

† De Bougainville's.

The LORD CHANCELLOR.—New South Wales comes to the Albany.

Lord ABERDARE.—Who was Hugh Gray ?

Mr. MOWAT.—He was a resident in the country for some years, and an intelligent investigator of its laws and its commerce and their incidents, who put his reflections upon them in this familiar form, but otherwise we have nothing to shew who he was. The map, however, is shewn by the inscription to be a publication of Longman's :—" London, Published July 6th, 1809, by Longman & Co., Paternoster Row."

The LORD CHANCELLOR.—It clearly is no authority, but it shews that the idea of extending up to the Albany was entertained by some persons at that time.

Lord ABERDARE.—Is there a map connected with Mr. Mill's Report ?

Mr. MOWAT.—Yes.

Lord ABERDARE.—Where is that map ?

Mr. MOWAT.—I will send for the book to my lodgings. I have not got it here.

Lord ABERDARE.—It does not touch on these questions ?

Mr. MOWAT.—I think some of his maps do.

Lord ABERDARE.—He was an authorized agent of Canada ?

Mr. MOWAT.—No, my Lord, of Ontario.

Lord ABERDARE.—Only of Ontario ?

Mr. MCCARTHY.—Yes ; and he is one of the counsel for Ontario here present.

The LORD CHANCELLOR.—He is the author of the report, and the map that accompanied it ?

Mr. MCCARTHY.—I think the map is only one of the old maps that are referred to.

Lord ABERDARE.—What was the date of that report ?

Mr. MCCARTHY.—Since this dispute and in consequence of it.

Mr. ROBINSON.—It was prepared for the arbitration. Perhaps, my Lords, I may be allowed to say, with reference to maps published before Confederation, that if your Lordships desire, no doubt any number of them could be brought from Canada, and that a joint cable could be arranged between us so as to have them sent over at once.

The LORD CHANCELLOR.—That would be a very inconvenient thing to be done, to enable one to come to a conclusion, because if maps are sent from Canada, then both sides must be heard upon the maps, unless it is a case of extreme necessity. What of course would be of the greatest value, if it were accessible, would be some map made out by public authority.* That map shews that at a certain date, 1809 or 1810, there were people who considered the Albany River to be the boundary of Canada, rightly or wrongly, which coincides, as it happens, with the Award. That is the impression that map makes, but then it is not a map published by any authority. It is merely a private writer's map which expresses what he understands to be the fact. Of course a map made under the authority of the Government would be of great use.

Mr. ROBINSON.—I may say with reference to maps that we do not attach the importance to them that the other side have done. Our impression from the maps is simply this, that all they can shew is the state of geographical knowledge at that time.

* Such a map, Bouchette's Map of the Provinces of Upper and Lower Canada, published in 1815, was procured from the British Museum at the instance of Ontario, and produced to their Lordships, but is overlooked in this report. It shewed Upper Canada extending northward to the Albany and to Hudson's Bay, and westward to the Lake of the Woods, and beyond. Mr. Bouchette was at the time "His Majesty's Surveyor-General for Lower Canada," and he dedicates the map to H. R. H. the Prince Regent. It is described in the Notes on Maps, being No. 185 in the list.

The Lord Chancellor.—Reputation is always a matter of importance on questions of boundary, and these maps are certainly some evidence of reputation. Of course we are free from the technical rules of evidence in courts of law, and taking the wider view, they are undoubtedly some evidence.

Mr. Robinson.—We have never disputed with reference to Mitchell's map, for instance, that it shews what was the general information and belief as to the state of the country at the time; but that is absurdly wrong in several respects, as we have now seen.

The Lord Chancellor.—I suppose that it is not correct in all respects is quite clear.

Mr. Robinson.—Now, my Lords: When your Lordships adjourned I was speaking of the Quebec Act, and the due north line, and I had referred to the De Reinhard trial as a decision on that point. I want to call your Lordships attention, with reference to that trial, to two points. In the first place, your Lordships will see, by page 660, that it was not the decision of one judge at a *nisi prius* trial. It was a case presided over by two judges under a commission, the Chief Justice, Sewell, and Justice Bowen, and there were other judges consulted apparently, because at page 659 it appears that De Reinhard was tried on such a day before Chief Justice Sewell and Mr. Justice Bowen, under the authority of a joint commission. Then your Lordships will find at page 684 that the Chief Justice, in McLellan's case I think it is, in giving judgment, says: "In this opinion the court are unanimous, for I have consulted my learned brothers who sat with me in the late trials." I only refer to that to shew what my understanding was that this was probably a joint commission addressed to all the judges; that some of the cases were argued before some of the judges, and some before others, and that they all consulted on this point and were all unanimous. The only other point with regard to that trial is, that my learned friend the Attorney-General on the other side has intimated to your Lordships his impression that the question of the competency of jurisdiction was considered in England, and that the prisoner was probably respited. One thing is certain, that we do not know the exact ground on which he was respited.*

Sir Barnes Peacock.—He seems to have been respited, and the petition for pardon did not seem to have got to the Government in some way for nearly three years, and then they say, considering the period during which he has been imprisoned, and the rough state of the country, they gave him a free pardon. They did not allude to the question of the decision being wrong.

Mr. Robinson.—Not in any way, and at page 683 it is said:

"Under the circumstances of this man's long confinement, the misery under which he has suffered, considering also the feelings prevalent in that wild district at the time, and the union of these Companies just now taking place, I entreat His Majesty's gracious pardon."

Sir Barnes Peacock.—They also allude to his having been kept in suspense for nearly three years, his petition having been mislaid, and not having been duly sent.

Mr. Robinson.—It was not sent.

Sir Robert Collier.—Those are the grounds.

Mr. Robinson.—No doubt they are the grounds, because at page 684 Lord Bathurst says: "In consequence of the circumstances therein represented, the

* That the reference to England was "in respect to the Court's competency of jurisdiction," and that it was referred "to the Home Department" in respect of "the difficulty in point of law," that there was a respite from time to time to afford time for a decision, and that it was represented "how important it will be that an early determination should be made upon the doubts that have arisen . . . as that determination will operate upon future cases," etc., are abundantly clear. See *ante*, p. 341, note *.

execution of whose sentence was respited;" so that there is no question that the question of jurisdiction never was considered.* It can shew nothing more. Then, I was proceeding last night to discuss the question of the due north line.

Sir BARNES PEACOCK.—I did not quite understand the Chief Justice's decision in Reinhard's case, because he lays down the eastern boundary—

Mr. ROBINSON.—That is a mistake, no doubt.

Sir BARNES PEACOCK.—It could not be the western boundary of Upper Canada, it was the eastern boundary of Upper Canada, and when this place was out on the west side of that boundary it might be still in Upper Canada. What the Chief Justice was endeavouring to shew was that the murder was committed within the jurisdiction of neither Upper nor Lower Canada.

Mr. ROBINSON.—That was it.

Sir BARNES PEACOCK.—And therefore his decision only put it outside Lower Canada.

Mr. ROBINSON.—It was too clearly outside Lower Canada to admit of any discussion.

Sir BARNES PEACOCK.—He does not shew it was outside Upper Canada, unless he made that mistake.

Mr. ROBINSON.—Your Lordships will find no question about that. He distinctly decides that the due north line is the line, whether he be right or wrong.

Sir MONTAGUE SMITH.—I do not think that is disputed.

Mr. MOWAT.—I think that is correct.

Sir BARNES PEACOCK.—He says:

"The western boundary of the Province of Upper Canada is a line drawn due north from the head of Lake Temiscaming till it strikes the boundary line of Hudson's Bay."

Mr. ROBINSON.—That is all wrong.

Sir BARNES PEACOCK.—That gives the boundary of Lower Canada.

Mr. MOWAT.—I have no doubt that is some mistake, probably of the reporter, and that what he meant to decide was that it was outside Upper Canada as well as Lower Canada.

Sir BARNES PEACOCK.—But he lays down the boundary wrong for the purpose of shewing it was outside the western line of Upper Canada.

Mr. ROBINSON.—If your Lordship reads the note to the same page, it says that is a manifest error.

Sir ROBERT COLLIER.—That is agreed on both sides.

Mr. ROBINSON.—Then I need not discuss it further; there is no doubt that that was the decision, whether right or wrong.†

Then, my Lords, I was discussing the question of what was the proper construction of the Quebec Act, and the meaning of the word "northward." I desired, or at all events I am prepared, to shew to your Lordships in detail, for I have taken the pains to go over all those, all the forts which were west, and all the forts which were east, of the due north line. I do not desire however,

* This is a mere assumption; upon the documents the inference seems clearly the other way. The respite, we are officially informed, was to procure the decision of the home authorities "in respect to the court's competency of jurisdiction." The paragraph of the letter referred to is more fully as follows: "In acknowledging the receipt of Your Lordship's despatch, No. 49 of the 28th of June last, referring to a letter addressed to me by Mr. Monck, transmitting an authenticated record of the trial of De Reinhard, a man in the service of the North-West Company, who was sentenced to be executed for the murder of Owen Kevnagh, but in consequence of the circumstances therein represented the execution of whose sentence was respited." (Earl Bathurst to Lord Dalhousie, 20 September, 1821). And see *ante*, p. 341, note *.

† Such indeed was the decision; but that the Court was doubtful of its correctness is shewn by the relegation of the question of boundary, and therefore of the question of jurisdiction, to the King in Council, as set out *ante*, p. 341, note *.

unless your Lordships should so wish, to go into all that in detail, for this simple reason, that I do not think your Lordships' view of that Act can possibly turn on whether there were ten, twenty or fifty men, more or less, west of that line, and such a number, more or less, east of it. The question must be the general principle. What I am prepared to shew to your Lordships, beyond all question, is, that by far the greater number in importance,* and in every other way, of the settlements west of old Quebec, established by the proclamation of 1763, were in point of fact east of the due north line. I cannot deny, and it is useless to attempt to deny, that there were settlements west of it.

The LORD CHANCELLOR.—We counted eleven yesterday.

Mr. ROBINSON.—Then, if your Lordships will go into the history of those settlements—remembering that the words of the Act are not "forts" or "posts" but "colonies or settlements," you will find that only two or three of them were of any importance at all.* Detroit, by far the most important, was east. The next one was St. Joseph; Fort Sandusky was east; Fort Miamis was east; Fort Vincennes was east, and all the posts of most importance* were east of that line. Then we come west to Fort Kaskaskias, Fort De Chartres and all the posts along the Mississippi, in the Illinois country.

The LORD CHANCELLOR.—Chagouamigon,† founded as far back as 1660, on Lake Superior.

Mr. ROBINSON.—That is near Duluth.

The LORD CHANCELLOR.—It is said to have been built in 1665 and re-established by Le Sueur in 1692, and there was a mission founded as early as 1660.

Mr. ROBINSON.—Yes, there is no question about that.

The LORD CHANCELLOR.—I only guess, but I should think it is very likely that that was a settlement of some importance from its position.

Mr. ROBINSON.—There are a number mentioned which I have taken the trouble to look up. There was the post of Le Sueur on the Mississippi, and there was the post of St. Antoine, again on the Upper Mississippi.

The LORD CHANCELLOR.—You need not go so far as the Mississippi.

Mr. ROBINSON.—I am only taking the different posts to see what possible bearing they can have. Then there was the Mission du St. Esprit.† Your Lordships will find that that apparently consisted mainly, if not entirely of Indians.

The LORD CHANCELLOR.—There was a fort there.

Lord ABERDARE.—Where was Fort Kaskaskias?

Mr. ROBINSON.—That was on the Illinois, and that is one of the settlements there unquestionably were. That is west of the line. Then there was Fort de Chartres.

Lord ABERDARE.—Why should all those forts have been left out?

Sir MONTAGUE SMITH.—Because they were French settlements.

Mr. ROBINSON.—They were French settlements.

Sir MONTAGUE SMITH.—The preamble of the Act of 1774 refers to the French settlements.

Mr. ROBINSON.—It does not say all French settlements.

Lord ABERDARE.—Why should they have been left out?

* On the part of Ontario this was denied, as being clearly contradicted by the evidence. See *ante*, pp. 187, note *, 348, note †, and *post* p. 355, note †.

† Mission du St. Esprit—Chagouamigon—Fort La Pointe—names all referable to the one place. It was situate on the south-westerly shore of Lake Superior, and of considerable importance as a settlement, trading station, and mission.

Sir MONTAGUE SMITH.—And why should there be an arbitrary division ?

Mr. ROBINSON.—It says there were many French settlements. We do take in many, and by far the larger number.*

Lord ABERDARE.—Why should not they have taken in all ? What reason could you suggest why they should not, because the territory was undoubtedly, I suppose, English territory ?

Mr. ROBINSON.—It was ceded up to the Mississippi by the definite treaty of 1763.

Lord ABERDARE.—Why should they be deprived of the advantages which it was intended to bestow by the Act on the inhabitants not between the Mississippi and this line ?

Mr. ROBINSON.—Our impression, derived from history, is this, and you will find it very strongly confirmed by Mr. Parkman's work, who is unquestionably the historian of that period—

Lord ABERDARE.—That is a recent work ?

Mr. ROBINSON.—Yes, but it is a book universally referred to.

Lord ABERDARE.—What is the date of it ?

Mr. ROBINSON.—I think there has been more than one edition.

Sir ROBERT COLLIER.—What does it purport to be ?

Mr. ROBINSON.—He has published a series of works.

Sir ROBERT COLLIER.—What does that work purport to be ?

Mr. ROBINSON.—This work contains an account of this part of the country. It is entitled "The Conspiracy of Pontiac, and the Indian War after the Conquest of Canada. By Francis Parkman." At page 253, he speaks of these forts, and in one of the maps attached to volume I. of the work he shews all these forts, and I think it is the best one that is to be found. Your Lordships will see it is prepared for the purpose. There is a little summary of all the forts that there are. [*Handing the map to their Lordships.*]

Lord ABERDARE.—The map does not shew it; there may be a summary in the text of the book.

Mr. ROBINSON.—The map shews several of them.

Lord ABERDARE.—It shows Kaskaskias.

Mr. ROBINSON.—I think it shews all the forts south of Lake Superior, as far as I know from looking at it.†

Lord ABERDARE.—Will you look at it now ?

Mr. ROBINSON.—It is headed "Forts and Settlements in America, A.D. 1763." I see Vincennes, St. Louis, Cahokia, Kaskaskias, Fort St. Joseph, Detroit, and Sandusky.

Lord ABERDARE.—It does not mention Fort St. Esprit ?‡

Mr. ROBINSON.—No; but your Lordships must remember that that map which you are looking at [*viz. : the Ontario Government map prepared for this reference*] is not a map which we recognize in any way.

* Counsel fails to give comparative particulars in support of this contention, which on the making an enumeration, is found not to have been well-founded. See *post*, p. 355, note †, *ante*, p. 348, note †.

† The map in question extends westward only to longitude 91½°, and northward to latitude 46°, and therefore excludes as well the upper portions of the Mississippi, on which were a number of French forts and settlements, as an extensive region, with its posts and settlements, to the southward and westward of Lake Superior. Moreover some then existing settlements in the part delineated are not set down. The Illinois settlements on the Mississippi were best shewn by Hutchin's map of them, a facsimile copy of which was laid before their Lordships by Ontario. A like copy appears in Parkman's Pontiac.

‡ St. Esprit—otherwise La Pointe, or Chagouamigon—was on the south-west shore of Lake Superior, and therefore outside the limits of the Parkman map. (See preceding note.)

Lord ABERDARE.—But surely this is not put before us entirely to mislead, with all these forts, and the dates attached to them, and the names of those who erected them.*

Mr. ROBINSON.—But the forts were tenanted by French soldiers, and they were abandoned at the time of the cession. They are not settlements where the French remained in numbers; they were military posts; that is the distinction in that respect.† Now at page 257, having given at page 251 an account of these posts, Mr. Parkman speaks of the bitter feeling that existed at the close of the cession, in consequence of the war, and of the removal of the forts which were then left on the east bank of the Mississippi to the west bank, and it seems natural and there is no question that a large number of those who were there in 1763 had left before 1774, because St. Louis and other settlements on the other side of the river were founded by those who left. But I do not desire to go into that at more length, because it would only prove the general proposition; I can prove nothing more.

Then, our view has been, further, with regard to that north line, that it is improbable that in the state of geographical knowledge at that time they would have taken, as the boundary of a province, a river of which they knew so little. They did not know where that river went to, or where its source was,‡ and it was perfectly evident that by running along that line, as it is said we must do, they would take in a vast and enormous country where there were no settlements,§ and a country which was better provided for by the form of government

* The map was prepared for the information and convenience of their Lordships, every statement on the face of it being based on a careful regard to the evidence actually before them. It very well illustrated Ontario's contentions in regard to the French occupation and the diffusion and progress of French settlement; together with the Hudson's Bay Company's posts. The opposing counsel had several times endeavoured to falsify, or break the force of, the facts marshalled upon the face of the map, but unsuccessfully. It shewed St. Esprit, La Pointe, or Chagouamigon, in its proper position. The Parkman map did not extend so far, and could not therefore shew the place—a circumstance overlooked by counsel.

† The evidence shewed that round most of the forts were fine settlements. Pownall, already quoted, says: "Most of these forts have fine settlements round them, and they do entirely support themselves. * * * Scarce anything is sent to these garrisons but dry goods and ammunition." In 1764, Colonel Bradstreet stated, on information of "persons lately from the Illinois, that exclusively of the French garrison there, the inhabitants are 600 fighting men, have 1,000 negroes well accustomed to the use of arms," etc. In the same year Governor Murray of Quebec, in a despatch to the Lords of Trade, encloses a document wherein it is stated: "There may be in this district, according to my estimate, 1,000 to 1,200 men," with "many negroes and Panis, whom they use to cultivate the earth." Monette informs us that "Kaskaskia, in its best days under the French regime, was quite a large town, containing 2,000 or 3,000 inhabitants, but after it passed from the crown of France, its population for many years did not exceed 1,500 souls." Parkman, writing of 1764, says: "At the date of this history, the population of the colony, exclusive of negroes, who in that simple community were treated rather as humble friends than as slaves, did not exceed 2,000 souls;" and he quotes Lieutenant Fraser, who visited the Illinois in 1765, as setting "down the number of white inhabitants at about 700 able to bear arms" and that "they have a great many negroes." All this has reference to the Illinois, and to that part of it which is west of the due north line, without reference to Prairie du Chien, St. Antoine and other places on the Upper Mississippi, which at this time had a very considerable population; also the posts to the southward and north-westward of Lake Superior; and those of the North-West.

Outside the argument on the Quebec Act, there was the other position of Ontario, that its rights of succession to the actual territorial possessions of France, to the westward of the inter-provincial line, could not be affected by the after-abandonment of posts which had been actually occupied up to the close of the French *regime*. The French garrisons were of course withdrawn at the cession, but the French and half-breed settlers for the most part remained. The exodus from the Illinois to the west side of the Mississippi was checked by the knowledge that Louisiana, no longer a French colony, had passed into the possession of the Spaniards, for whom the French had even less love than they entertained for the English.

‡ But it has been shewn that the position of the true sources was well known, and was delineated with approximate correctness on many of the maps, although wrongly on Mitchell's and some others. *Ante*, p. 185, note. And as to not knowing where the river went to—every foot of its course, from the region of Milles Lacs to the Gulf of Mexico, had been traversed by Frenchmen and Canadians, many of them commissioned by the Governors, as Marquette, Joliet, La Salle, Du L'Hut, Perrot, Le Sueur, etc., etc.

§ But there *were* settlements, among which a belt of settlements on the Mississippi from the Minnesota down to its junction with the Ohio. The unsettled or derelict regions, between the due north line contended for by the Dominion, and the line of the Mississippi and of the most north-western point of the Lake of the Woods, were by far less extensive than the like regions to the eastward of the due north line.

which was provided in 1803 by stipendiary magistrates. There was really no necessity for extending government to the country.* I do not think I can say more upon that question, and I leave it therefore, simply saying that that is the contention, and has been from the beginning the contention, of the Dominion Government.

Now the next question which we come to is, assuming that the northward line—because we are only considering one act of this whole Statute, and one line of it only is in question—"northward to the southern boundary of the" Hudson's Bay territory—assuming that goes along the Mississippi, the next question which we have to consider is, where does that go to? Now our view of that matter has been this: It is the southern boundary of the territory granted to the Hudson's Bay Company.

The LORD CHANCELLOR.—It goes up to that.

Mr. ROBINSON.—It goes up to that, wherever that may be. There is no question about that. The Act is at page 366.† The words are: "to the southern boundary of the territory granted to the Merchants Adventurers of England, trading to Hudson's Bay." Now, in the first place, we say that that clearly means—and we hardly think that capable of dispute—the territory granted *de facto*, and that that can involve no question of the validity of the Hudson's Bay Company's charter. If A should grant land to B, and should then grant land to C, extending to or bounded by the land which he had previously granted to B, the finding of the boundaries of C's land would involve no investigation of B's title at all.

* The Imperial authorities thought otherwise, and so acted. The following are extracts from the Royal Instructions, of 3rd January, 1775, to Governor-General Carleton, of Quebec: "That besides the foregoing courts of criminal and civil jurisdiction for the province at large, there be also an inferior court of cirminal and civil jurisdiction in each of the Districts of the Illinois, St. Vincenne, Detroit, Missilimakinac and Gaspé, by the names of the Court of King's Bench for such district * * * and each of the said courts shall consist of one judge, being a natural born subject of Great Britain, Ireland, or our other plantations, and of one other person, being a Canadian, by the name of assistant or assessor, to give advice to the judge when it may be necessary," etc; "The extension of the limits of the Province of Quebec necessarily calls forth your attention to a variety of new matter and new objects of consideration: the protection and control of the various settlements of Canadian subjects, and the regulation of the peltry trade, in the upper or interior country, on the one hand, and the protection of the fisheries in the Gulph of St. Lawrence and on the Labrador coast, on the other hand, point to regulations that require deliberation and despatch. The institution of inferior judicatures with limited jurisdiction in criminal and civil matters for the Illinois, Poste Saint Vincenne, the Detroit, Missilimakinac and Gaspé has been already pointed out and the appointment of a Superintendent at each of those posts is all that is further necessary for their civil concerns," etc. "And whereas we are desirous that a proper provision should be made for the support of our Government within our said Province of Quebec, we do, therefore, hereby declare it to be our Royal intention that the following annual salaries and allowances be discharged and paid out of any revenues arising to us within the same, or out of such other moneys as shall be granted or appropriated to the uses and services of our said Province of Quebec, that is to say: * * * To the Lieutenant-Governors or Superintendents at the

Illinois, Poste St. Vincenne, Detroit, Missilimakinac, Gaspé	at £200 each	£1.000
To the Judge of the Inferior Courts of King's Bench and Common Pleas at each of the above five Posts, at £100 each Judge		500
To an assistant or assessor at each Post, at £50 per annum		250
To a sheriff for each District, at £20 per annum, etc.		100."

(Joint App. 379-382.)

The Royal Commissions to the several Lieutenant-Governors duly issued subsequently. That to the "Lieutenant-Governor and Superintendent of the Post and its Dependencies, established, or to be established, within the Illinois District, in our Province of Quebec," was dated the 7th of April, 1775. It is printed *ante*, p. 134.

Ontario contended that these documents alone, with the Royal Commission of 1774, put beyond controversy the question of what interpretation the Crown, and its advisers and Law Officers, put upon the Quebec Act, in regard to an extension to the Mississippi.

† Printed *ante*, p. 34.

Lord ABERDARE.—Does your contention go as far as this? What they granted, you argue, is up to the watershed.

Mr. ROBINSON.—Yes, my Lord.

Lord ABERDARE.—Very good. Now supposing, historically, it was proved that they had not, within reasonable time, occupied that country in any sense, but on the contrary that this land was occupied by others—French Canadians—would you then say that those words covered all that was originally granted, in spite of the subsequent failure to occupy by themselves, and the subsequent occupation by the French.

Mr. ROBINSON.—Yes, my Lord, under the circumstances.

The LORD CHANCELLOR.—You could not put forward such a proposition as that if a question had arisen, internationally, between the French and English, that the settlement of the whole of the country, going back to the St. Lawrence, or to the part now in dispute, could in any way be contrary to British rights because King Charles II. had given a charter, in these terms, to the Hudson's Bay Company.

Mr. ROBINSON.—Yes, my Lord. I shall come to that.

The LORD CHANCELLOR.—That would be a very extraordinary proposition, unless indeed you were to assume, which for my part I am not prepared to assume, abstract notions of rights of discovery to have been, between the two nations, the governing principles.

Mr. ROBINSON.—At all events, I can state to your Lordships what we contend, in a very few words, I think. In the first place we say that the construction of the Hudson's Bay charter is plain, and that in its words it goes to the height of land.

The LORD CHANCELLOR.—Well, no, it does not indeed. You see, you cannot make out any limit or boundary without introducing that idea. Perhaps you may be right there; but the charter says not one word about that.

Mr. ROBINSON.—I am not going to discuss that question at length, for a reason which I will give to your Lordships in a moment.

The LORD CHANCELLOR.—You see that unless some such limits can be arrived at, then it might be open to question whether the objection taken to the charter being void for uncertainty was not good.

Mr. ROBINSON.—Yes, my Lord.

The LORD CHANCELLOR.—We need not hear any argument about that, because we think that whether the limits can be found or not from the charter, yet if they are found *de facto* that is enough.

Mr. ROBINSON.—First taking the words of the charter, they give "the rivers within the straits and bay and all the lands upon those rivers." That is very clear.

Sir ROBERT COLLIER.—It is "rivers within the entrance of the straits."

Mr. ROBINSON.—Yes, "rivers within the entrance of the straits commonly called Hudson's straits." It is at page 344. It gives

"The sole trade and commerce of all the seas, straits, bays, rivers, lakes, creeks and sounds in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's Straits, together with all the lands and territories upon the countries, coasts and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid."

The LORD CHANCELLOR.—"That are not already possessed."

Mr. ROBINSON.—Yes, my Lord, I am coming to that. That is the exception. I am perfectly right in saying that they gave the rivers, and all lands on the rivers. I am right also in saying that subsequent provisions of the same charter, in which they provide for the appointment by the Hudson's Bay Company, and

so on, "for the good government of the said Company, and of all governors of colonies, forts and plantations, factors, masters, mariners and other officers employed, or to be employed in any of the territories and lands aforesaid," shew very clearly that they contemplated by that the giving of a large territory. They never would have given this land, or spoken of it as a plantation, and made provision for the appointment by the grantees of governors of the colonies which they had granted, if they meant it to be anything but a very extensive territory.

The LORD CHANCELLOR.—Then, as against France, I suppose you would not seriously contend that King Charles the Second could create any right.

Mr. ROBINSON.—What we do contend, my Lord, is this. I am anticipating my argument there, because I wish first to try and settle the construction of the charter as to what the word "granted" meant; but what we do contend is that the English, beyond all question, had obtained Hudson's Bay and whatever goes under the construction of international law with that discovery. They had discovered Hudson's Bay; they had taken possession of a considerable portion of the coast. Whatever, according to the rule of international law they acquired by that discovery the English had.*

The LORD CHANCELLOR.—What was that?

Mr. ROBINSON.—I cannot say.

The LORD CHANCELLOR.—Then, when different nations are disputing about boundaries, they have recourse to abstract reasoning and certain principles and so on; but to represent that as a rule of international law—and especially as a rule of international law which had any existence or was imagined by anybody at the time we have to consider in this enquiry—is surely a proposition which cannot be maintained. You might just as well go back to the time at which the Pope was supposed, by international law, to be able to give away whatever districts in the world he pleased. Those words "international law" are very misleading. There are certain principles generally accepted amongst nations; there are particular reasons which have been constantly resorted to when disputes have taken place, about boundaries or otherwise, between nations, as the best available means of settling those disputes; but to say that there is any general international law that gives to the first discoverer of the mouth of a river and a certain line of coast, as against all other nations, whether he occupies it or not, or without regard to what extent it is occupied or not, a right to all the country that is watered by any of the rivers that come in there, is a proposition which no amount of modern books will prove.

Mr. ROBINSON.—Well, I am not desirous for one moment of arguing this question at length, or expressing any opinion of my own. All that I can say is that I find it laid down in the clearest language in the book which my learned friend has referred to, and your Lordship will find that confirmed.

The LORD CHANCELLOR.—We really cannot have the laws of the World made by gentlemen, however learned, who have published books within the last twenty or thirty years.

Mr. ROBINSON.—I do not desire to have the laws of the World made in that way.

The LORD CHANCELLOR.—Can you find any such proposition in Chancellor Kent?

Mr. ROBINSON.—No, I do not know that he has written a word on the subject.

* Upon the facts in evidence, and denying as well counsel's premises as their application, Ontario shewed the priority of the French possession as well of the rivers as of the regions watered by them. *Ante*, pp. 189, note †, 200, note *, 250, note ‡, 253, note *; appendix B, hereto.

The Lord Chancellor.—Or Wheaton ?

Mr. Robinson.—No, I do not think he has written upon it.

The Lord Chancellor.—These writers merely generalize from the reasoning which has been employed between particular nations and particular subjects.

Lord Aberdare.—It must be borne in mind that Charles II. was utterly unaware of the enormous bearing of such a proposition as yours.

Mr. Robinson.—As all the persons were who took possession, or as all the powers were who took possession, of the new world at that time; nevertheless the other grants were construed upon that footing.

The Lord Chancellor.—It is quite certain that France never recognized any such idea, nor can I perceive that it was ever suggested on the part of the Hudson's Bay Company in the early stages. We first meet with it in the Selkirk grant of 1814.

Mr. Robinson.—You will find some grants by France very much upon the same principle, granting rivers, and the lands upon rivers, which were held to mean the same thing; but at all events, I have in Sir Robert Phillimore's work, the last edition, first volume, page 277, and the previous edition at page 338—

Lord Aberdare.—Are those the pages which were substantially read yesterday ?

Mr. Robinson.—I am not going to read those passages to your Lordships. Those passages are substantially the same as were read yesterday; but I was going to read another passage which was not read yesterday, which I think is at page 286, in which he speaks of the kind of possession that is requisite under certain circumstances. I am reading now from the second edition, page 286:

"The chief portion of the Oregon territory so valuable solely for the fur-bearing animals which it produces. Various establishments in different parts of this territory, organized a system for securing the preservation of these animals, and exercised for these purposes a control over the native population. This was rightly contended to be the only exercise of proprietary right of which these particular regions at that time were susceptible; and to mark that a beneficial use was made of the whole territory by the occupants."

That shews that the nature of the occupation by the Hudson's Bay Company here was efficient as being the only occupation which could be taken by them.*

The Lord Chancellor.—But do not you see that the same argument tends to establish every French fort as a *bona fide* occupation ?

Mr. Robinson.—I have not forgotten that.

Sir Montague Smith.—The French had hunted there a great deal.

Lord Aberdare.—Yes, to a far greater extent than the Hudson's Bay people.

Mr. Robinson.—That will not affect the argument about the French if it is a sound argument.

Sir Montague Smith.—You seem to have forgotten that this charter itself supposes that there may be rights on the part of the French.

Mr. Robinson.—I was coming to that afterwards.

Sir Montague Smith.—Whether there were or were not, is a matter in dispute.

Mr. Robinson.—The only other authority I desire to refer your Lordships to, is the latest work of international law, that of Mr. Hall, at page 292, where

* But it has been shewn, and by the Company admitted, that they never, during the French *regime*, had any sort of occupation of the interior. The French, throughout, were in adverse possession and in the enjoyment of the trade. See *ante*, p. 284, note †; *post*, p. 366, note †. Appendix B, hereto.

there is a note, which in my view is a valuable one, setting out the substance of the law.

The LORD CHANCELLOR.—Do you think that the authority of such works is greater in proportion to their recency?

Mr. ROBINSON.—No, I cannot say that it is; but it is, of course, greater or less in proportion to the standing of the writers.

The LORD CHANCELLOR.—These writers repeat each other, and are constantly extending the notion of international law.

Mr. ROBINSON.—I am speaking of the proper construction of the Hudson's Bay charter. One thing is perfectly certain, that we have here printed the opinion of six gentlemen of the very highest authority in the Law in England, two of them afterwards distinguished upon the bench, and another of whose standing and reputation I am not perfectly clear, who are unhesitatingly of opinion that this grant conveys to the Hudson's Bay Company all the territories up to the height of land.

The LORD CHANCELLOR.—What page are you now referring to?

Mr. ROBINSON.—I am now referring to pages 47 and 52 of the Manitoba Appendix. At page 47 I find:

"Copy Queries and opinion of Mr. Justice Holroyd, Sir Samuel Romilly, Mr. Cruise, Mr. Scarlett and Mr. Bell.

"Whether any objection can be made to the grant of the soil"—

The LORD CHANCELLOR.—Which of those names is unknown to you?

Mr. ROBINSON.—Dr. Stoddart, who is spoken of afterwards.

The LORD CHANCELLOR.—None of these other names?

Mr. ROBINSON.—I ought not to be ignorant, but I may say that I do not know what reputation Mr. Bell had.

The LORD CHANCELLOR.—He had a very great reputation indeed.

Mr. ROBINSON.—I was not familiar with it.

Sir ROBERT COLLIER.—Is this a case stated by the Hudson's Bay Company?

Mr. ROBINSON.—I do not know, my Lord, but I think so.

Sir MONTAGUE SMITH.—I should think so.

Mr. ROBINSON.—Now, your Lordships will see it does not depend upon any case at all, or any facts, if you will simply look at the first passage.

"Whether any objection can be made to the grant of the soil contained in the charter, and whether the grant will include all the country the waters of which run into Hudson's Bay, as ascertained by geographical observations."

Now that depends upon no facts. The answer is:

"We are of opinion that the grant of the soil contained in the charter is good, and that it will include all the country the waters of which run into Hudson's Bay, as ascertained by geographical observation."

Now surely nothing can be clearer than that. Now, that was a second opinion of Mr. Cruise, because at page 39 there is an earlier one. The last opinion I read was given in 1813. At page 39 I find a similar opinion by Mr. Cruise.

"That therefore the opinion of the geographers would be adopted, namely, that all the countries lying upon the waters which run into Hudson's Bay are included within the charter."

I think there must be a misprint there, for it says, "for therein it will be ineffectual." I think that must mean, "for otherwise it will be ineffectual." That was also a second opinion of Mr. Justice Holroyd's.

The Lord Chancellor.—Mr. Cruise is a great English lawyer, whose digest is a very useful book, but I do not know that on such a subject as this his authority is very great.

Mr. Robinson.—I do not know my Lord, but I am perfectly satisfied that his opinion has far greater weight than my own, and that is the reason I desire to refer to it. That was a second opinion of Mr. Justice Holroyd's which I read, because, as appears at page 34, he had expressed the same opinion in the previous year. The first opinion is at page 34; the second opinion is the joint one to which I have already referred your Lordships. The gentleman whose name I was not familiar with, and whose reputation I did not know, was Dr. Stoddart. Your Lordships will find his opinion at the beginning of page 50, and in full at page 52.

Lord Aberdare.—Yes; he goes into it fully.

Mr. Robinson.—Yes, my Lord. All that I wish to say about it is that if your Lordships will read that opinion I am quite content to adopt it as my argument. I can add nothing to it I am perfectly certain; nor can I state the considerations which we think should prevail in the construction of this grant more clearly, or as clearly, or as strongly as he has stated them there. If they do not convince your Lordships, I am sure I should be wasting your Lordships' time in trying to do so.

The Lord Chancellor.—May I ask, with regard to these several opinions, what was the precise matter which the learned counsel were asked upon? You see some opinions are to be construed with reference to the cases upon which they are given? Was it stated that there was a question of boundaries between Canada and the Hudson's Bay Company, or were the opinions given with reference to any such question?

Mr. Robinson.—They were given with reference to the disputes existing, if I remember rightly, about the North-West Company.

The Lord Chancellor.—I supposed that, but then, you see, if the minds of counsel are directed solely to disputes turning upon the validity of the charter, and not suggesting counter claims upon another kind of a title, they might give the go-by to what is the question we have to consider entirely, and the fact that it was not brought before them is a thing to be considered.

Lord Aberdare.—As a fact, between the North-West Company and the Hudson's Bay Company—the Hudson's Bay Company might think the North-West Company intruders?

The Lord Chancellor.—Supposing this was an unoccupied territory which the Hudson's Bay Company had the right to occupy and possess, and make themselves masters of, under their charter, and that the only question was between them and certain traders who denied the validity of the charter, the can quite understand opinions of this sort being given upon differences between such parties and upon such a question, but would they really have much bearing if the question were between France and England for instance, France insisting that she had occupied a certain territory which came within the theoretical limits.

Mr. Robinson.—I am not presuming to say what value they have, my Lord.

The Lord Chancellor.—No; but have they any bearing? It is not a question of value, but a case and opinion relating to the matters brought to the attention of counsel, and to the question raised by those matters, and not to other questions quite different.

Mr. Robinson.—It is so my Lord; but I am at least within the rule in doing this, which was what I desired to do—

The Lord Chancellor.—You are quite at liberty to refer to this, as shewing that upon a question submitted to them these opinions were expressed by lawyers, some of whom, or every one of whom, would be a great authority.

Mr. Robinson.—Of course I cannot do more—I can only also point out that their opinions were not asked upon any additional extraneous facts, which might be true or untrue. The charter was put before them, and they were asked to express their opinion upon the construction of that charter—What land does it cover? And there is their opinion.

Sir Robert Collier.—They had not a case submitted to them?

Mr. Robinson.—No, my Lord.

The Lord Chancellor.—I do not think one would be disposed to dispute the proposition that, so far as the Crown of England could give it, it gave to the Hudson's Bay Company a right, if they were able to make themselves masters of the country, to the territory up to the sources of the rivers; but they did not make themselves masters of the whole of that country, for some other nation had come in in the meantime.

Mr. Robinson.—To that I will come afterwards, but in the meantime I do not wish to extend my argument. I wish, if possible, to save your Lordships' time by simply adopting what you will find at page 52, and if your Lordships will be good enough to read that and consider it as my argument I can add nothing to it. The other argument I am coming to now. Now then I assume, because I certainly can prove it no further, that, as between the Crown and the Hudson's Bay Company, this charter granted to that Company the land up to watershed.*

Then we come to what is the effect of any subsequent proceedings. Our view has always been, and your Lordships will remember that I am not pressing all these views strenuously upon your Lordships, we are not directly parties here, we represent the Dominion, and the Province is a part of the Dominion, but it is our duty to place before your Lordships the grounds upon which the Dominion came to the conclusion which they adopted, and it was impossible for us to disregard those opinions which we find there, and the view of international law which we find stated in what we take to be works of the best authority.

Our view has always been, with regard to the other portion of the case, that the French occupation, that the French doings, the French position in that country, the French habitations in that country, or whatever you choose to call it, have no bearing whatever upon this case.† Whether we are right or wrong in that, that is the view which has always been adopted by the Dominion, and which has been presented to them many years ago by those who were consulted. Now it must be remembered that both parties here claim as it were under a a common grantor, that is to say, the same authority which granted the charter to the Hudson's Bay Company, fixed the limits of the Province of Ontario. The charter was granted by the Crown of England, the limits were fixed by the

* Ontario pointed to opinions of other notable legal authorities, which were quite at variance with those quoted by counsel; and especially the joint opinion of Lord Brougham and associates, which is very clear as to the territorial grant being limited by the relation and proximity of the territories to Hudson's Straits: "Within the Straits must mean such a proximity to the Straits as would give the lands spoken of a sort of affinity or relation to Hudson's Straits," etc. (Ontario App. 153.)

† Ontario shewed that the Crown itself and the Parliament had regard in the fixing of the boundaries to the facts of the French possession: The Act of 1774 professedly deals with territories ceded by France to Great Britain by the Treaty of 1763; the limits of Quebec were extended by the Act to embrace "a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said Treaty," etc; and the extension of Upper Canada by the Orders in Council and Proclamation approved by the Statute of 1791, was to embrace "all the country," to the westward of the inter-provincial line, commonly known as the Canada of the French.

legislature of England,* and we have always thought, and submit now, and think still that the question is not what, as between England and France, the Hudson's Bay Company were entitled to claim, or this charter secured to them, but what the Crown of England, or rather the Government of England, or England I may say shortly, under whom we both claim, considered to be the limits of the Hudson's Bay charter and recognized as being the extent of their grant.†

Lord ABERDARE.—Do you, as representing the Dominion, claim as part of Lower Canada all that is east of this line, that is described in Lord Durham's commission, which ran up to the shore of Hudson's Bay ?

Mr. ROBINSON.—All to the east of that line.

Lord ABERDARE.—You claim it ?

Mr. ROBINSON.—I suppose that is part of Lower Canada ; but I have not thought of it, because it is not in question here.

Lord ABERDARE.—If so, you are claiming lands which, according to your contention, were conceded to the Hudson's Bay Company just as fully as those to the west of that line.

Mr. ROBINSON.—Oh no, my Lord ; Lower Canada does not claim beyond the height of land.‡ The limits of Lower Canada's boundary, if I recollect right, for I am speaking from recollection only, are the height of land. I think it begins at Cape Grimington and runs along the high lands. I must look at that to be certain, because that would depend.

Lord ABERDARE.—Then what is the meaning of that boundary line, which is so frequently referred to in the Commissions, between Upper and Lower Canada.

Mr. ROBINSON.—That is the boundary line running through Lake Abbitibbi northward.

Lord ABERDARE.—Yes, to the shores of Hudson's Bay.

* The limits of the territorial grant to the company were never directly defined by either the Crown or the Parliament of Great Britain ; but we have the Acts of the Crown restricting the territorial pretensions of the Company, as in the extension of the old Province of Quebec through the height of land, and to the most north-western point of the Lake of the Woods (Commission of 1786), and the extension of the Province of Upper Canada also through the height of land, and to the shore of Hudson's Bay (Commissions 1838-1846) ; and the like extension of Lower Canada

† The contention of Ontario was—having regard to the paramount title of France and to the actual *de facto* possessions of the French and the Hudson's Bay Company respectively ; to the after acquirement by the Crown of the rights and possessions of France as a result of wars and treaties which embraced not only the American, but also the European and universal interests of both nations ; to the loss of territorial rights to the Company under the treaties of Neutrality and of Ryswick ; and to the defeasance, in the circumstances of the case, of any rights of postliminy—that the advantages acquired by the Crown under the treaties of 1713 and 1763 could not enure to the benefit of the Company ; that the Company had become denuded of its territorial Charter title, except in so far as the Crown might choose, as a matter of grace, to recognize the same in whole or in part ; that the Crown united in itself every territorial interest, or rival interest, and was free to dispose of the same as it might be advised. (See *ante*, p. 331, note ‡.)

‡ The same Acts of authority that drew the easterly boundary line of Ontario to the shore of Hudson's Bay, carried to the same point the westerly boundary of Lower Canada, and of course Quebec will rightfully claim the extension of her territory which this would give. The Commission to the Earl of Durham as Governor-in-Chief of Lower Canada of 30th March, 1838, runs :—"And which said Province of Lower Canada is also bounded by a line drawn due north from the head of the said lake [Temiscaming] until it strikes the shore of Hudson's Bay." The subsequent commissions are in accord with this. The line of the northerly boundary of Quebec, eastward from this point on the shore, remains undefined. Several possible lines present themselves, each with more or less evidence in its favour ; but upon the whole, that which appears to present the strongest claim, and could be upheld on largely the same principles which guided the arbitrators in the selection of the Albany River for Ontario, is a line drawn through the East Main River, from its mouth to its source, thence eastward to the westerly boundary of that part of Labrador which is under the jurisdiction of Newfoundland, and thence southerly and easterly along that boundary on its various courses to that point of the 52nd degree of north latitude which is intersected by a line drawn due north from Ance au Blanc Sablon, and thence south by the last mentioned line to the sea shore. The line between Quebec and the Newfoundland section of Labrador would need to be defined. The East Main River was proposed by the Hudson's Bay Company, as the boundary between them and the French, on the east side of the Bay, in 1701.

The Lord Chancellor.—It goes from the River Ottawa through Lake Temiscamingue up to the River Nottaway.

Lord Aberdare.—They take no notice of the height of land; they go right through it all, and they seem to throw into Upper Canada everything that is to the west of that.

Mr. Robinson.—Where are these limits to be found?

The Lord Chancellor.—In Lord Durham's Commission; I do not know whether that is the earliest place where they are, but they are clearly to be found there.

Lord Aberdare.—They are mentioned before, but they are mentioned with the words "boundary line of Hudson's Bay," and then it was argued that that meant the boundary of the territory claimed by the Hudson's Bay Company. But then you have in a subsequent Commission the words, "to the shore of Hudson's Bay."

Mr. Robinson.—If your Lordships will permit me to say so, that is the branch of my argument founded on the Commissions; and I was going to take it afterwards. That is entirely a separate matter.

Lord Aberdare.—But I wanted to know as a matter of fact; and surely the Dominion must know whether it claims as a part of Lower Canada all this territory which apparently is marked off as belonging to Lower Canada.

Mr. Robinson.—I cannot say what the claim of the Dominion would be as regards Lower Canada, because I have not addressed myself to that, not thinking that it was in question. I cannot speak authoritatively as to that. I should have to go back to the Quebec Act. We have always regarded that Act as defining the boundaries whatever they may be.

Sir Montague Smith.—That is common ground, and if so, the question is, whether the Province of Quebec does not indisputably go up to the north, independent of the watershed?

Mr. Robinson.—I think I understand his Lordship's question. As I understand his Lordship, he is referring to its being carried up by a commission.

Lord Aberdare.—No; the commission explains more clearly, in indisputable language, that which before was described in language more open to doubt.

Mr. Robinson.—What was previously described in another commission.

Lord Aberdare.—I do not want you to anticipate your argument.

Mr. Robinson.—I will pass on.

Sir Montague Smith.—You were just saying that what the French did had no bearing on this case.

Mr. Robinson.—Yes. That has been always in our view a most important question. We are both here, claiming under England, your Lordships must remember; and we say that the rights which might exist internationally as between France and England cannot affect this question which is one as between the Province of Ontario and the Hudson's Bay Company, both claiming under England.* Now, there is no question that the Crown of England assumed to grant to us—

The Lord Chancellor.—Is there a copy here of Lord Durham's commission in full.

Mr. Robinson.—There is a copy.

The Lord Chancellor.—This seems to be only extracts from it.

Mr. Robinson.—They probably would not give the whole commission.

The Lord Chancellor.—I should like to see it. It is the commission of the 30th of March, 1838.

* Ontario shewed that this was, in the circumstances, a wholly fallacious contention. (See *ante*, p. 363, note †.)

Mr. ROBINSON.—I will proceed with the commissions, if your Lordship thinks it the best order.

The LORD CHANCELLOR.—It is not merely the commission to Lord Durham; but the same description is repeated in the commission of the same year to Sir John Colborne, as Governor of Upper Canada. The same thing is repeated in the commission to Sir John Colborne, of December, 1838, as Governor of Lower Canada, and the commission of 1839.

Mr. ROBINSON.—Yes.

The LORD CHANCELLOR.—In truth in those two years, 1838 and 1839, there was no less than five commissions, all containing that description. There were the commission to Lord Durham for the whole of Canada, apparently both Upper and Lower, a commission to Sir John Colborne, also for Upper and Lower Canada, and another during the same period; and in each commission the description is the same.

Mr. ROBINSON.—There is no question as to the meaning of the terms of the commissions. The question as to their effect I propose to discuss.

The LORD CHANCELLOR.—Reputation is of great importance, and what reputation can be higher than that which is expressed in these commissions.*

Mr. ROBINSON.—Of course I am very ready and very desirous to go to that part of the argument, if your Lordships prefer it, but I am trying to point out what we think a very important branch of the case—the effect of the French possession and the French acts within the country.

Sir MONTAGUE SMITH.—You say that has always been regarded by the Dominion as being irrelevant.

Mr. ROBINSON.—Yes.

Sir MONTAGUE SMITH.—What is your argument then upon that?

Mr. ROBINSON.—My argument I was about to address to your Lordships upon that. We say that the question being solely as between Ontario and the Hudson's Bay Company, the question of what was granted to the Hudson's Bay Company must be what the Crown of England treated as the Hudson's Bay territory; that when Canada is directed by the Act of Parliament to go to the southern boundary of the territory granted, in order to ascertain that, we must ascertain (all French claims being removed by the cession of 1763) how and in what light the Crown of England regarded their grant. Anything that the French obtained after the grant by the Crown of England to the Hudson's Bay Company—anything the French obtained by possession, or whatever it may be, was practically obtained as an act of war. It was obtained as an act of trespass, or a hostile act against the British Government.†

* The passing of such a commission is a very formal Act of State indeed. Taking as an instance, that of 27th December, 1774, to Sir Guy Carleton, as Captain-General and Governor in Chief of the enlarged Province of Quebec: (1) the King, through the Earl of Dartmouth, Secretary of State, directs the Lords Commissioners for Trade and Plantations to prepare the draft; (2) the draft so prepared is, by Order in Council, referred to the Lords of the Committee of Council for Plantation Affairs; (3) these Lords consider the draft, and refer it to the Attorney and Solicitor-General for their opinion, whether its provisions correspond with those of the Quebec Act, and are proper in point of law; (4) the opinion of the Attorney and Solicitor-General; (5) report of the same Lords; (6) Imperial Order in Council, 19th December, 1774, the King being present: "His Majesty . . . is pleased, with the advice of His Privy Council, to approve of the said draft of a commission (which is hereunto annexed) and to order, as it is hereby ordered, that the Right Honourable the Earl of Dartmouth, one of His Majesty's Principal Secretaries of State, do cause a warrant to be prepared for His Majesty's Royal Signature, for passing a commission conformable to the said draft under the Great Seal of Great Britain:" (7) the affixing of the Great Seal; (8) the Royal Signature. (Joint App. 374-5.)

The passing of the Royal Instructions was attended by very much the same formalities, except that the Great Seal was not affixed. They were always approved by the Sovereign in Council. (*Ib.* 377-9.)

† Ontario shewed, on the evidence, the priority of the French possession; the continuous, peaceable occupation by France of the whole interior, up to the Cession; the ousting of the Company, as usurpers and trespassers, from the isolated places they had for a short space occupied on the shores of the Bay; the

The LORD CHANCELLOR.—You do not pretend it was occupied in any other sense than that there were forts at the mouth of the rivers and upon Hudson's Bay?

Mr. ROBINSON.—Yes, there is that unquestionably.

Sir MONTAGUE SMITH.—In what respect did your occupation differ from that of the French?

Lord ABERDARE.—In being less complete.

Mr. ROBINSON.—No, we discovered the bay and the rivers,* and we settled upon the coast.† I am either right or wrong in saying that gave us the right according to the rules at that time prevailing.

Sir MONTAGUE SMITH.—That is discovery; but as far as occupation went?

Lord ABERDARE.—Did you occupy them within reasonable time?

Mr. ROBINSON.—We think we did. Considering the nature of the territory, and the purpose for which it could be occupied, we think we occupied within a reasonable time,‡ and we say the French came in there simply as trespassers,§ endeavouring to take from us what the Crown of England had asserted a right to,‖ what she had established her right to by discovery* and what she had granted her subjects.¶ Then we say whatever rights could be founded upon the occupation by the French at all events vanished when the French ceded the whole country, in 1763, to England,** and afterwards, when England subsequently to that recognized the rights of the Hudson's Bay Company under the charter granted by the Crown,†† the Crown never for a moment adopted the rights acquired by the French as entitling the Crown to any portion of this land.‡‡

Lord ABERDARE.—Then comes the question, why on earth did they appear to take all east of this line.

Mr. ROBINSON.—That I will come to.

Lord ABERDARE.—That at once breaks enormously upon your argument.

The LORD CHANCELLOR.—The Commissions were Acts of State, and of great authority and importance, beginning contemporaneously almost with the Con-

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confirmation of these places to France by the Treaties of Neutrality and of Utrecht; the consequent loss to the Company, irrevocably, of these places under any past titles, whether by charter, occupation or otherwise howsoever; and the after-acquisition of these places by the Crown, in its own right, and to its own uses, under the Treaties of Utrecht and of Paris.

* The so-called discovery by the English from the sea was merely incidental to the search for a North-West Passage, and was followed by no sort of possession or attempt at possession, and there was a complete abandonment even of the voyages. The French discovery of this region was overland, followed by an actual and ever continuous possession of the lands and of the trade, and supplemented by occasional voyages by sea. (*Ante*, pp. 200, note *, 253, note *; appendix B, hereto.)

† Their settlement was of a few isolated spots only on the shore, and but temporary, the French quickly ousting them as trespassers on the territory of Canada.

‡ The evidence is quite contradictory of this position. The Company never occupied any part of the interior (except Henley, and that not until 1740) nor even sent any of their servants there before 1774; and they frankly so admit (*ante*, p. 284, note †), nor before the Treaty of Utrecht could they be said to have had any settled possession even of the shore of the bay, (*ante*, p. 253, note *.) The French possession on the other hand was actual and continuous down to the very close of their *regime*. (Appendix B, hereto.)

§ That is exactly what Ontario contended was the position of the company; as regarded the French, it had no application, (*ante*, p. 253, note *; appendix B, hereto).

‖ This assertion was by the charter of 1670; but even the charter reserved the rights of France. Then the French had asserted their right nearly half a century earlier, by including these regions in their charter of 1627 to the Hundred Associates, (*ante*, p. 200, note *; appendix B, hereto.)

¶ The grant was by the charter, as to which see note ‖, *supra*.

** Ontario denied this. See *ante*, p. 363, note †.

†† There never was recognition of any defined territorial limits. And in fact the Crown assigned to the Provinces immense regions which had been claimed by the Company as comprehended in the charter. *Ibid.*

‡‡ And yet it dealt with this land without regard to any supposed rights of the Company.

quest of Quebec, and coming down to the years 1838 and 1839, and probably the case depends upon them more than upon anything else.*

Mr. Robinson.—Then my Lord, I will go to them, and say what I wish to say, to try and establish the argument which I was advancing, because that argument is one which, whether right or wrong, has been the one always adopted by the Dominion.

Sir Robert Collier.—You have something to add to your present argument before you go to that. You may as well finish that perhaps.

Mr. Robinson.—It is just as your Lordships desire. I am only anxious to place myself in the hands of the Court, and conduct my argument as far as I am able as they desire. If I am to conclude that argument, we say that the question is—what did England regard as the territory she had granted to the Hudson's Bay Company? Because, beyond all doubt, by the Act of Parliament we were entitled to go to the limit of that territory.

Now the claims which the Hudson's Bay Company made have a double aspect in this case. They bear in so far as they were known to, and sanctioned by, or adopted by the Crown, upon the construction placed by the Crown upon their own charter, just as an executive act of the same nature in the commissions would be an act shewing the construction placed by the Crown upon their grant. They also bear upon that expression in the Rupert's Land Act "the territory held or claimed." I am not again going into that in detail (my learned friend has done that) as to what it was they did claim; but I want to point out to your Lordships one or two points which seem to me at all events to be worthy of a special notice. After the Treaty of Utrecht, by which the Hudson's Bay territory substantially was ceded to England by France (the treaty having been concluded in April, 1713), in May, 1713, the company demand delivery of possession to their nominees. Your Lordship will find, at page 576, what I take to be the plainest recognition by the Crown of the rights of the Hudson's Bay Company. As I understand it, the Treaty of Utrecht at all events ceded all that territory to England.† Now at page 576, Lord Dartmouth writes to the Lords of Trade, Her Majesty having been asked (on the previous page) by the Hudson's Bay Company that she would be graciously pleased to direct the said Act of cession might be transmitted to the petitioners as also Her Majesty's commission, to certain gentlemen named to take possession. In answer to that Lord Dartmouth says:

"I am to acquaint you that the places and countries therein named belonging of right to British subjects, Her Majesty did not think fit to receive any Act of cession from the French King, and has therefore insisted only upon an Order from that court for delivering possession to such persons as should be authorized by Her Majesty to take it; by this means the title of the Company is acknowledged and they will come into the immediate enjoyment of their property without further trouble."

Now that, we say, is the strongest conceivable acknowledgment and affirmance, and assertion of the title of the Hudson's Bay Company by the Crown: "We have nothing to do with this territory. France has been obliged to yield it to us, but we decline to take a delivery of it to ourselves. We simply require that the French Crown shall deliver it to the Hudson's Bay Company, whose territory it is."‡ Now in pursuance of that, possession was given.‡

* See as to this, *ante*, p. 365, note *.

† It was claimed by France, and on this proceeding by Ontario, that the cession was restricted to certain of the posts on the shore, with a very limited tract dependent upon each. See *ante*, pp. 279-80, where their Lordships have already dealt with the point.

‡ The actual facts were different from this. France knew nothing of the company in the transaction. By the treaty, the "restoration" was to be "to the Kingdom and Queen of Great Britain" and the actual

Sir Robert Collier.—The delivery was of the Bay and Straits of Hudson, and the buildings thereon erected.

Mr. Robinson.—Yes, there is no question what they claimed. Now we shall see what construction the Crown put upon the extent of the claims of the Hudson's Bay Company. Will your Lordships refer to pages 511 and 512. You will remember that commissioners were appointed after the Treaty of Utrecht, with the view of settling these territories, but whether they ever did settle them or not is a disputed question, but upon which the weight of evidence, I think, is against their having settled them. At page 511, your Lordship will find the document.*

Sir Robert Collier.—We have had this document.

Mr. Robinson.—Yes, that document has been referred to. Your Lordship will find that this was a memoir on the limits of Hudson's Bay, sent by the English commissaries appointed by England, through Lord Stair, Ambassador in Paris, to the Maréchal d' Estrées, one of the French commissaries. We there have the demand made by the Crown on behalf of the Hudson's Bay Company. What can possibly be stronger than the demand made there as including the watershed ?† In the first place " the commissaries named by His Britannic Majesty demand that the said limits may be defined " to " commence from the north cape of Davis' Bay."

The Lord Chancellor.—That is the 49th parallel ?

Mr. Robinson.—No, not what I am on at this moment.

The Lord Chancellor.—That is farther to the north-east ?

Mr. Robinson.—Yes.

The Lord Chancellor.—All that we have to deal with as to this, is surely the 49th parallel.

Mr. Robinson.—Yes ; but your Lordship will see when I point out the rest how completely their demand includes the height of land. Their demand was :

" That no French vessel, boat, or ship whatsoever, shall be allowed to pass to the north or the west side of the north cape of Davis' Bay, towards or into the Strait or Bay of Hudson, under any pretext whatsoever ; and furthermore that . . . the 49th parallel [shall be their limit.] . . . The said commissaries further demand that the subjects of His Most Christian Majesty shall not build forts, or found settlements, upon any of the rivers which empty into Hudson's Bay, under any pretext whatsoever."‡

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delivery was to be " to the British subjects having commission from the Queen of Great Britain to demand and receive the same." The Queen's demand upon the French Court was " for an order . . . for delivering possession to such persons as should be authorized by Her Majesty ;" and the French King's command to M. Jérémie is " to deliver up to the bearer of the Queen of Great Britain's order," etc. (Joint App. 504, 575-6.) And the agents appointed to receive possession bore the Queen's commission accordingly. (*Ib.* 575, 578.)

Then as between the British Crown and the company, the contention of Ontario was that the company at this time had no territorial interest other than such as the crown might of its pure grace choose to concede to it (*ante* p. 363, note †); that such concession as the crown appeared disposed to make on the present occasion was, subsequently, in the actual practice—whether because of the intention having been originally to make it merely provisional, or because and as a consequence of the company's utter failure to occupy the interior country, or, in fact, anything beyond the few posts on the shores of the Bay—in large part ignored, or, at all events, greatly restricted, and extensive regions claimed to be within the charter limits dealt with and assigned to other purposes, without regard to any supposed rights of the company.

* Boundaries claimed by the British Commissaries, printed *ante*, p. 159.

† This was unauthorized by the Crown. See the next following note.

‡ In making this demand as to the rivers, the English commissaries exceeded their instructions, which contain no reference to it ; as they did also in demanding that the line should commence in lat. 56½°, or the north cape of Davis' Bay, the instructions requiring lat. 58½° or Grimington's Island. (Joint App. 508 ; *ante*, p. 159.) That this was done by design, and without authority, appears also by the letter of Commissary Bladen : " At our next meeting . . . we design to give in the claim of the Hudson's Bay Company in writing, with some few additions pretty material for their service." (Joint App. 510.) Later, Commissary Pulteney writes : " That the French have not been willing to entertain us now and then with a conference . . . cannot I should think be accounted for, but by supposing they knew we came prepared to reject all their demands, and to make very considerable ones for ourselves." (Joint App. 512.) The Company, in their memorial of 1750, still adhered to the parallel of 58½°.

The Lord Chancellor.—We must reconcile that with the demand of the 49th parallel as the boundary line.

Mr. Robinson.—Yes.

The Lord Chancellor.—As the boundary of their territorial dominion, they proposed the 49th parallel, and beyond that they wanted to restrict French trade even in French territory.

Mr. Robinson.—They did.

The Lord Chancellor—That may or may not have been a reasonable demand, or one they were likely to persevere in, but how does it affect the boundary?

Mr. Robinson.—In this way, we submit. It shews the boundaries the Crown thought had been granted to the Hudson's Bay Company by their grant, because it was a claim made by the Crown for the benefit of the Hudson's Bay Company upon France.

The Lord Chancellor.—It demands something outside this boundary. The 49th parallel is evidently one which would not coincide with that.

Mr. Robinson.—Our belief is that the 49th parallel and the height of land were named indifferently. Practically they come to much the same thing.* They give and take.

The Lord Chancellor.—They knew that the 49th parallel, if it were adopted as a boundary, would not extend to the subject of their further demand, because it seems from the further demand, if they had already got a boundary beyond which neither French nor any person employed by them should pass it would be quite unnecessary to put in the further demand which followed.

Mr. Robinson.—Our construction has been that there would not be an inconsistency in any such demand, nor an intention to have it inconsistent, but that it is consistent because they regarded the 49th parallel and the height of land as practically the same.*

The Lord Chancellor.—There seems to be no foundation for such an idea either in fact or in nature; but supposing there had been, then everything they could possibly desire would be granted by establishing that as the boundary, but knowing it is not so, or may not be so, they make a further demand.

Mr. Robinson.—Then I should be content to say they demanded the 49th parallel, because whether we take the 49th parallel, or the height of land, we certainly have more than the Award gives us.

The Lord Chancellor.—It strikes me this document is very much indeed against the notion that at that time they had any idea of the height of land as their territorial boundary, because having proposed a boundary of their territorial rights, they then go on to desire to restrict French trade even to the south of that boundary, if these rivers happened to go up so far.

Mr. Robinson.—The view we submit, on the other hand, is, that their subsequent demand is merely an illustration of their first demand. In other words they say, we demand the 49th parallel, and to shew you what we mean we add this further demand. All that I desire to shew is, that if that demand is taken all together, it is utterly impossible to frame a demand more comprehensible and more clearly including everything watered by those rivers, because, first, they say we demand that no ship of yours shall come inside the straits, in other words no ship of yours shall approach the mouth of any of those rivers. In the next place, we demand that no subject of yours shall settle upon any part of those rivers. How can you make or frame a stronger demand, including the rivers† and all the country watered by them.

*The height of land and the line of 49°, were very far from being practically the same. See *ante*, p. 333, note **.

†As already shewn (*ante*, p. 368, note ‡‡) this demand of the rivers was not authorized by the Crown.

It seems to me that language would fail to include more clearly a demand to all the countries watered by the rivers. Now, it is to be remembered, that was a demand made by the Crown, authoritatively, upon France. It was an executive act, at least of the same character, I apprehend, as commissions and so on, and has the same weight in the construction of the Crown grant as commissions may have in relation to other matters.* In 1714, the company at all events acknowledge the delivery of the property, and they repeat the limits, and say they demand that the French shall not come north of them by land or water.

Sir ROBERT COLLIER.—When do they acknowledge the delivery?

Mr. ROBINSON.—It was in 1714.

The LORD CHANCELLOR.—What is the page you are referring to?

Mr. ROBINSON.—Pages 576 and 577.

Sir ROBERT COLLIER.—This is what they acknowledge:

"The company do, with the utmost gratitude, return your Majesty their most humble and hearty thanks for the great care your Majesty has taken for them by the Treaty of Utrecht, whereby the French are obliged to restore the whole Bay of Hudson and the Straits."

That is all.

The LORD PRESIDENT.—You see what they mean by that if you look at the note at the top of the page 575. They mean what was meant by the original words of the charter. They say so themselves. There is a note by the Hudson's Bay Company.

Mr. ROBINSON.—

"The company are, by their charter, constituted Lords Proprietors of all those lands, territories, seas, straits, bays, rivers, lakes and sounds within the entrance of the straits,"

and so on.

The LORD CHANCELLOR.—At the top of page 575 it says:

"These limits being first settled and adjusted, the company are willing to refer their losses."

Then they make a note.

The LORD PRESIDENT.—I mean that shews what they mean by the shorter expression, "Bay and Straits of Hudson." It is their own explanation of it.

Sir ROBERT COLLIER.—

"All those lands, territories, seas, streights, bays, rivers, lakes, and sounds within the entrance of the streights,"

is all they say.

The LORD PRESIDENT.—It is an old expression, which they are taking from the original charter.

The LORD CHANCELLOR.—In one place, there is a reference to the commissioners with a view to the settlement of the limits. In another place there is an acknowledgment of the delivery. No person can suppose they mean everything they claimed had been *de facto* delivered.†

Mr. ROBINSON.—At all events that was in 1713 and 1714; and what I have subsequently referred to, in 1719, is the demand of the Crown, thereby, as we say,

*It was not authorized by the crown. See *ante*, p. 368, note **.

†There was nothing *de facto* delivered except the isolated posts on the actual shores of the Bay. And yet the company expressed themselves as fully satisfied on that score. The French retained the interior posts and country until the cession of Canada.

putting the construction upon their own charter. The crown plainly demand you shall not enter the Straits; you shall make no settlement on the rivers. That demand they make on behalf of the company.

The only other point to which your Lordship's attention has been called is this. It is said the company at one time were content with a lesser boundary. That was in 1701. It is to be found at pages 563 and 564.* It is after the Treaty of Ryswick, and it is impossible to frame a claim more clearly without prejudice. The company there, while they said they would take bounds much more limited, expressly asserted their undoubted right to all Hudson's Bay.

Sir ROBERT COLLIER.—

"The limits which the Hudson's Bay Company conceive to be necessary as boundaries."

Mr. ROBINSON.—Yes, and at page 564 they say, if this is not accepted, they adhere to their undoubted right to the whole Bay and Straits. It was not accepted, and that ends that. So, from the beginning to the end, the company had always claimed up to parallel 49, whether it was or was not identical with the height of land. If they do not get 49, the award must be wrong. The Crown had adopted that claim and asserted it for them as against France.†

Then we pass on to the negotiations which led to the Rupert's Land Act. That Act again, whether rightly or wrongly, we have always conceived practically to put an end to the whole question. That Act admits, or authorizes the admission, into the Confederation; and for the purposes of that Act, in other words, for the purpose of this admission into the Union, it defines it as being all the land and territory which the Hudson's Bay Company hold or claim. If your Lordships will look at page 164, when those negotiations first began, or near the initiation of them (for I do not desire to go through them minutely again) your Lordships will find that the Secretary of State for the Colonies wrote to the Governor-General of Canada, saying:

"You are aware that the Hudson's Bay Company claim under the Charter of 1670."

Sir ROBERT COLLIER.—That is in 1856.

Mr. ROBINSON.—Yes, that is about the beginning of the negotiations which ultimately ended in the Rupert's Land Act, and in the admission. I am coming to that now. That is in connection with the Hudson's Bay claims.

"You are aware that the Hudson's Bay Company claim under the Charter of 1670, and the various Acts of Parliament which they consider to have subsequently recognized its rights of proprietorship, exclusive trade, taxation, and government, over all the regions under British dominion watered by streams flowing into Hudson's Bay."

So that there was a distinct statement by the Government of England to the Governor-General that that was the claim of the Hudson's Bay Company.‡ Ne-

* Printed *ante*, p. 206, note ‡.

† For Ontario's position in regard to this contention, see *ante*, pp. 190, note †, 235, note *, 331, note ‡; in addition to which Ontario pointed out, that if the Crown, as claimed, put forward that claim solely in the interest of the company (which Ontario did not admit) the Crown subsequently receded from that view of their obligation, and disposed of large tracts of territory to the northward of the 49th parallel, without regard whatsoever to any supposed rights therein of this company.

‡ The paragraph quoted of Mr. Labouchere's despatch is completed thus: "The extent and ground of this claim are defined in the 'Statement of Rights,' printed in the annexed parliamentary paper, and in the accompanying map." That was the claim formulated in the Statement of Rights referred to, and which was prepared by the Company in 1850, for the information of Parliament, as was also the map which accompanied and formed part of it. The map shews the territorial claim to be, as stated by Mr. Labouchere, to "all the regions under British dominion watered by streams flowing into Hudson's Bay." In the Statement of Rights, the Company put forward the astounding proposition, that "under this grant [*i.e.*, the

gotiations followed upon that, and I do not desire to refer to those negotiations at length and in detail, because they have been referred to more or less. At all events Canada answered that, practically asserting that the Hudson's Bay Company had no territorial rights at all.* They sent home Chief Justice Draperat that time, to insist upon that view.† There was an enquiry by a Committee of the House of Commons in England (which is before your Lordships), who took evidence. The result of all that was, that the British Government declined altogether to question the Hudson's Bay Company's charter.‡ They said to Canada: We think ourselves precluded, having submitted the matter to the Law Officers, by every principle of equity, from questioning the charter.§ Do you wish to do so for yourselves? We will afford you every facility if you like to question it. Canada said: No, we will not take the responsibility of questioning the charter.‖ Then the Hudson's Bay Company, at one time (in 1858), were rather desired, by the then Colonial Secretary, to submit the validity of their charter as a question for the Courts. They distinctly refused to do so. They said their charter had been

Charter] the Company *have always* claimed *and exercised* dominion as absolute proprietors of the soil understood to be embraced by the terms of the grant, and which are more particularly defined in the accompanying map; and they have also claimed *and enjoyed* the exclusive right of trading in those territories." That they had exercised such dominion, or enjoyed the exclusive trade of the inland regions, or indeed anywhere away from the shores of the bay, is so notoriously at variance with the actual facts, that one cannot imagine how such a mis-statement came to find place in so formal a document. Until Lord Selkirk's abortive undertaking, there was no attempt even to exercise such dominion, and until the issue of the license of 1821, to this Company and the North-West Company of Montreal, there was no enjoyment of exclusive trade, and then only jointly with the Canadian Company. Except at Henley, the Hudson's Bay Company never left the shore, or set foot in any of the inland parts, during the period of the French rule, nor in fact till towards the close of the last century, when they commenced their establishments in the North-West pursuant to a right common to all British subjects.

* The reference is to the Order in Council of 17th January, 1857 (Sess. Paps. Can. 1857, No. 17; Joint App., 155) wherein is urged "the importance of ascertaining the limits of Canada in the direction of the territory over which the Hudson's Bay Company claims jurisdiction. The general feeling here is strongly that the western boundary of Canada extends to the Pacific Ocean." But there is nothing said in regard to the northern boundary.

† His instructions were, on the contrary, quite general. They are under Order in Council of 16th February, 1857: "As it is impossible to anticipate the nature of the evidence that may be taken, or the conclusion that may be arrived at by the Committee, or the course which Parliament or Her Majesty's Government may think proper to adopt on the report of the Committee, it is not in His Excellency's power to convey to you at present any instructions of a precise or definite character. . . . As soon as any parliamentary committee on the subject of the Hudson's Bay Company or territory is constituted, you will take steps for offering to afford all information in your power relating to the interests or claims of Canada. You will consider it as a part of your duty to watch over those interests, by correcting any erroneous impressions, and by bringing forward any claims, of a legal or equitable kind, which this Province may possess, on account of its territorial position, or its past history." (Joint App. 165-7; Sess. Paps. Can., 1857, No. 17.)

‡ As to the question of the validity of the charter, in 1858 and 1859 the Imperial Government, through Sir E. B. Lytton, urged the Company to be consenting parties to proceedings for testing it, notifying them that in default the Government would themeslves take the necessary steps; and in 1869, through Earl Granville, they intimated to the Company their opinion "that the very foundations of the Company's title were not undisputed;" and on the question of the boundaries, their opinion was always pronounced, that they should be submitted for judicial, or quasi-judicial, decision. (See *ante*, p. 333, note §.)

§ That is, the Law Officers, in 1857, so advise as to the question of the validity, but, on the other hand, they "cannot but feel that the important question of the boundaries of the Hudson's Bay Company might with great utility, as between the Company and Canada, be made the subject of a quasi-judicial enquiry," etc. (See *ante*, p. 333, note §.)

‖ This hardly represents the true position. Canada emphatically questioned the validity of the charter, but considered that it properly devolved rather upon the Imperial Government than upon Canada to institute the necessary proceedings. The joint address of the Canadian Parliament to Her Majesty, of 13th August, 1858, represents "that the approaching termination of the license of Trade . . presents a favourable opportunity for obtaining a final decision on the validity of the charter," and "that Canada . . has a right to request from Your Majesty's Imperial Government a decision of this question," etc. And in the joint address of the same Parliament, of 29th April, 1859, the opinion is expressed "that Canada ought not to be called upon to litigate the question of the validity of the charter claimed by the Company, inasmuch as such portion of territory as the charter covers is not part of Canada, and is, if the charter be invalid, subject to Imperial, and not Provincial, control," etc. (Joint App., 225, 240; and see, also, 225.) Had the matter not been, as it ultimately was, settled, on the initiative of the Imperial Government, on the basis of a compromise, it cannot be doubted that Canada would herself have taken the necessary steps, under protest.

recognized by numerous Acts of Parliament, and they would submit no question which implied any doubt as to its validity. Canada would not question it herself.* Then it was suggested to Canada: Do you not wish to take part, or had you not better take part, in negotiations with the Hudson's Bay Company for the cession of its territory. Canada declined. She said the Imperial Government granted the charter, and had better negotiate with the Company to whom they granted it, and our arrangements can be made subsequently. They then sent four delegates from Canada to assist in those negotiations, though not directly, but to be there as a board representing Canada as I understand it. Then Orders in Council were passed, and so on.† There was an address to Her Majesty from the Dominion Parliament. There were arguments strongly urged by the Dominion Parliament that the cession should be made without any reference to the Hudson's Bay Company. England refused to consent to anything of that sort and insisted upon protecting the rights of the Company.‡ Your Lordship will find, at page 273, in 1868, the Colonial Secretary writes to the Governor-General, refusing to transfer,§ and saying:

"I purpose to introduce a Bill into the Imperial Parliament with the view of authorizing any arrangement which may be effected on the basis thus indicated; of defining the territory over which it extends,"

* See *ante*, p. 372, note .

† Messrs. Macdonald, Cartier, Brown and Galt, who formed the ministerial delegation of that year to England, reported to the Governor-General, 12th July, 1865, the result of their conferences with the Imperial Ministers on this head: "We arrived at the conclusion that the quickest solution of the question would be the best for Canada. We accordingly proposed to the Imperial Ministers that the whole British territory east of the Rocky Mountains, and north of the American and Canadian lines, should be made over to Canada, subject to such rights as the Hudson's Bay Company might be able to establish; and that the compensation to that Company (if any were found to be due) should be met by a loan guaranteed by Great Britain. The Imperial Government consented to this. . . . The results of our communications with the Committee of Her Majesty's Government were placed by Mr. Cardwell in the form of a despatch to Your Excellency." (Joint App. 257; Journals, Leg. Ass., Can., 1865, p. 54). Mr. Cardwell's despatch, dated the 17th June, 1865, agrees with this statement. (*Ibid.*) The negotiations for confederation then intervened, and the position of Canada in regard to the Hudson's Bay Company is elaborately set out in an Order in Council of 22nd June, 1866, in which it is stated that "Canada would, ere this, have opened negotiations with the Hudson's Bay Company for the extinction of their claims, had it not been for the prospect of her speedy absorption into the proposed Union of the British North American Colonies. It would obviously have been improper for the Canadian Government to commence negotiations which they could not hope to complete, or to enter into engagements, the fulfilment of which must fall on the whole Confederated Provinces." (Joint App. 259; Sess. Papers, Can., 1867-8, No. 19.) Then the British North America Act, 1867, provides (sec. 146) for the admission of Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions, etc.: and thereafter, in so far as Canada was concerned, the matter was in the hands of the learned counsel's own clients, the Dominion Government.

‡ The Parliament of Canada, in their address to Her Majesty, of December, 1867, asked for the transfer of Rupert's Land and the North-western Territory to the Dominion, and undertook "That in the event of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any Corporation, Company, or individual within the same shall be respected, and placed under the protection of courts of competent jurisdiction." (Joint App. 266; Journals, Coms. Can., 1867-8, pp. 56-7.) It cannot therefore be truly said that it was proposed to ignore the Hudson's Bay Company's rights, or refuse them protection.

§ What he really says is: "Her Majesty's Government will be willing to recommend a compliance with the prayer of the Address, so soon as they shall be empowered to do so with a just regard to the rights and interests of Her Majesty's subjects interested in those territories. They are advised, however, that the requisite powers of government and legislation cannot, consistently with the existing charter of the Hudson's Bay Company, be transferred to Canada without an Act of Parliament. Before such an Act can be obtained it is necessary to consider the position of the Hudson's Bay Company. . . . I have called upon the Company to state the terms on which they would be prepared to surrender to the Crown whatever rights they have, . . . with the intimation that no present payment in money will be made to them, but that in the transference of their rights to Canada, they might have a reservation made to them of defined portions of land [etc.] . . . I purpose to introduce a Bill into the Imperial Parliament with the view of authorizing any arrangement which may be effected on the basis thus indicated; of defining the territory over which it extends; and authorizing the subsequent transfer to the Canadian Government of the rights and powers to be acquired by the Crown, in respect to government and property, in accordance with the prayer of the Address." (Journals, Coms. Can., 1867-8, p. 367.)

and so on. So that the intention of the government here to pass a Bill defining this territory was also then expressed. Then the next thing we find is, that in 1868, Messrs. Cartier and McDougall, two of the then Ministers of the Crown in Canada, were sent to England. That was after the passing of the Rupert's Land Act. Your Lordship will find, at page 275, that before going to England they specially called the attention of the Government "to the terms of the recent Act of the Imperial Parliament to 'enable Her Majesty to accept a surrender, upon terms, of the lands, privileges, and rights' of the Hudson's Bay Company, which declares that Rupert's Land, for the purposes of that Act, 'shall include the whole of the lands and territories held or claimed to be held' by the Company.'" And they recommend that they be authorized to arrange for the admission of the North-West Territory into union with Canada, either with or without Rupert's Land, and the Committee of the Privy Council of Canada report upon that, and it is approved by the Governor-General. Then the Rupert's Land Act is passed, which is to be found at page 445. Now what we say with regard to that Act is that it practically puts an end to the whole of this controversy, and that it was intended to put an end to it. The way in which it was arranged was this: Her Majesty accepted from the Company a transfer of their whole property, and, for the purpose of the transfer, the property was defined, and it was surrendered to the Crown as all the lands the Hudson's Bay Company had claimed.

The Lord Chancellor.—Held or claimed.

Mr. Robinson.—Yes, "held or claimed to be held by the said Governor and Company." Then the Imperial Parliament, or rather the Crown of England, having the property in themselves, granted that property to the Dominion. The Dominion acquired that property from the Crown; the Dominion paid for that property the sum of £300,000, the money coming from the joint purse of the confederated Provinces.

The Lord Chancellor.—Supposing any part belonged to Canada. Nothing was paid to Canada, I suppose—was it?

Mr. Robinson.—No, it was not; but for the purposes of getting that Act, and for the purposes of getting the territory, it was vested in the Crown; it was acquired from the Crown by Canada, not by Ontario.

The Lord Chancellor.—But is your proposition, that if under those words a considerable slice of Upper Canada was taken, that that was taken without any consideration by the Imperial Government from Upper Canada?

Mr. Robinson.—Yes, that is so; it is acknowedged by Canada, for that purpose, to be part of Rupert's Land.

Sir Montague Smith.—How does Canada's claim affect Ontario?

Mr. Robinson.—Simply because Canada now derives her title to that property from the Imperial Government. Let us just test it.

Sir Barnes Peacock.—It was to be surrendered to the Crown on condition that the Crown was to put it back again into Canada. That was the Act of Parliament.

Mr. Robinson.—Yes.

Sir Barnes Peacock.—It was not to be the Crown's property.

Mr. Robinson.—No.

Sir Barnes Peacock.—But it was conveyed to the Crown on condition that the Crown would within a certain time reconvey it.

Mr. Robinson.—Yes, after a time.

The Lord Chancellor.—It is an extraordinary thing to say, that the Imperial Government took, without consideration, from Canada, or Ontario, part of

its territory, and included it in Rupert's Land, to be by some future Act made a distinct property. Of course, if such a thing was part of the Imperial Act, it will receive its proper construction, but it seems to be an extraordinary thing. Of course, that assumes that it was part of Upper Canada. If it was part of Upper Canada, and it was intended to pass under the Act, then it clearly falls within the words.

Mr. ROBINSON.—Are not the words plain? Is not the property which Canada thereby receives, the property which the Hudson's Bay Company hold or claim to hold? Is it not quite clear what property they did claim to hold? If so, just look at what the effect of a contrary construction would be. Is it possible to hold, that after the united Provinces have paid a sum of £300,000 for this property, which, as I say, comes from a joint rate levied on all the provinces,—comes from their joint purse—

The LORD CHANCELLOR.—Property taken from Upper Canada without notice.

Mr. ROBINSON.—Not without notice.

The LORD CHANCELLOR.—And a rate levied upon them to pay for what belonged, not to them but to somebody else. But there is not the slightest trace that I can see in the controversy, that anything was to be taken from Upper Canada.

Mr. ROBINSON.—All I desire is, to present to your Lordships what we conceive to be the meaning, and see what the practical result is. Supposing after this money was paid for this territory, derived from the source I have already indicated, somebody were to come in and say, "Why, three-fourths of this property belonged to us before."

The LORD CHANCELLOR.—But they are not so claiming.

Mr. ROBINSON.—They are now claiming.

The LORD CHANCELLOR.—That claim is set aside as manifestly unfounded, and you are not called upon to answer it.

Mr. ROBINSON.—But they are now claiming that part of the property which the Hudson's Bay Company claim as having belonged to them before this transfer. That is what I mean.

The LORD CHANCELLOR.—There is nothing in these words to shew it.

Mr. ROBINSON.—Apart from the controversy, Upper Canada did claim a great deal of this property as being theirs before the transfer.

Lord ABERDARE.—Who is the Honourable Joseph Cauchon?

Mr. ROBINSON.—He was the Commissioner of the whole Province.

Lord ABERDARE.—Of the whole Province of Canada?

Mr. ROBINSON.—Yes. He was Commissioner of Crown Lands of the Province of Canada, in 1857.

Lord ABERDARE.—In 1857, when he was Commissioner, what did he represent?

Mr. ROBINSON.—He represented Upper and Lower Canada.

Lord ABERDARE.—When you turn to page 169, you will see what the claims of Canada are. I do not see Upper Canada.

Mr. ROBINSON.—There is no doubt what their claims were. They made the strongest claims, and asserted that the Hudson's Bay Company had no territorial right at all.

Lord ABERDARE.—No. Look at page 169. You will see that the Hudson's Bay Company were allowed to establish themselves on the Canadian territory.

Mr. ROBINSON.—Yes. They assert the French view.

Lord ABERDARE.—Look at page 169, at about line 12.* The Commissioner says, that the Company "have had every facility they could possibly enjoy in their own territories, if such exist;"—of that there is no doubt—"whether on the coasts of Labrador, Lakes Huron, Superior, or Winnipeg, whether on the Saguenay,"—which I suppose is wholly Canadian,—"the St. Maurice,"—which I suppose also is wholly Canadian,—"the Ottawa, the Red River, the Assiniboine, or the Saskatchewan." You will see that they couple together the rivers which are undoubtedly and indisputably Canadian, with those which the Hudson's Bay Company claim, as having been permitted to establish posts there:

"Wherever they have operated within the boundaries of Canada they have had precisely the same scope as within their own territories on the shores of Hudson's Bay."

Mr. ROBINSON.—Yes, and you will see that the wording of that passage clearly corroborates what I said, that they emphatically denied all rights of territory to the Hudson's Bay Company.

Lord ABERDARE.—Yes. They say—you have had our territory, and you have carried on your operations on our territory, and you have had the same facility and precisely the same scope on our territories as you have had within your own territories on the shores of Hudson's Bay.

Mr. ROBINSON.—Yes. They said—we simply allowed you to trade in our territories just as you would within your own.

Lord ABERDARE.—Yes.

The LORD PRESIDENT.—In page 170 you will see he says this:

"In the first place then, with respect to the territory affected by the Charter of the Hudson's Bay Company, it may be admitted that it would not only be difficult, but absolutely impossible, to define it. It is therefore fortunate that its limited extent renders the question of little importance, further than that it becomes necessary to consider and rebut the very large pretensions of the Company."

The LORD CHANCELLOR.—However, any extravagant view taken by the representative of Canada could not diminish the right that they had. But to say that the use of the word "claim" is to take away part of Upper Canada, and annex it to Rupert's Land, is a proposition which is really beyond all argument.

Sir BARNES PEACOCK.—This is an Act really which authorizes the Hudson's Bay Company's surrender of all that they claim. It is not because it authorized the Hudson's Bay Company's surrender that it would be binding upon any other

* EXTRACT FROM THE MEMORANDUM OF THE HON. JOSEPH CAUCHON, COMMISSIONER OF CROWN LANDS, CANADA, 1857:—

"The second point to be taken into consideration, and which is of a more important nature, is that which affects the operations of the Company within the boundaries of Canada, and on this head, it must be admitted that they have had every facility they could possibly enjoy in their own territories, if such exist; whether on the coasts of Labrador, Lakes Huron, Superior, or Winnipeg; whether on the Saguenay, the St. Maurice, the Ottawa, the Red River, the Assiniboine, or the Saskatchewan—wherever they have operated within the boundaries of Canada, they have had precisely the same scope as within their own territories on the shores of Hudson's Bay: not indeed but what if opposition had sprung up, the same facilities must necessarily have been afforded to any rival traders, had they not been effectually protected from such rivalry by their unlimited means, their extensive ramifications and complete organization, with which no rival traders were able to compete, unless indeed to a very limited extent in the immediate vicinity of the settlements.

"There are indeed parts of the Province so remote from established settlements, and having so little direct intercourse with them, that in former years it might have been to some extent a tax upon the country to have established tribunals sufficient to enforce the laws over regions inhabited only, with one exception, by the servants of the Company and the Indians, though it may now be reasonably questioned whether corresponding benefits would not have accrued from such a course, while it must be admitted that the Company have at all events reaped a profit, taking together the costs they have been put to, from the want of legal tribunals and the monopoly of the trade which the non-organization of such tribunals has practically been the means of enabling them to enjoy.

"The exception referred to, where a considerable settlement exists, besides the employees of the Company and the Indians, is the Red River Country." (Sess. Papers, Can., 1857, No. 17.)

persons, Ontario, or any other Colony, not to claim that which belonged to them. It was to bind the Hudson's Bay Company, saying, "When you receive this £300,000, and have made a surrender you will have no claim to Rupert's Land. Then section 4 enacts:

"Upon the acceptance by Her Majesty of such surrender, all rights of government, and proprietary rights, and all other privileges, liberties, franchises, powers and authorities whatsoever, granted, or purported to be granted, by the said letters patent, to the said Governor and Company, within Rupert's Land, and which shall have been so surrendered, shall be absolutely extinguished."

It does not say that it shall extinguish the rights of any other Colonies—of Upper Canada, or Ontario.

The LORD CHANCELLOR.—The question is whether this territory did belong to Canada. If it did belong to Canada, then no doubt it was no part of Rupert's Land.

Mr. ROBINSON.—Substantially, Canada treated for this territory on the footing that it did not belong to them, and the Confederation paid for it on that footing.* Now let me refer your Lordship to section 5 of the Rupert's Land Act. What can be the meaning of that? And remember this is an Imperial Act, over-riding everything:

"It shall be competent to Her Majesty, by any such order or orders in council as aforesaid, on address from the Houses of the Parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada."

The LORD CHANCELLOR.—That shews that it was not so before.

Mr. ROBINSON.—Yes.

The LORD CHANCELLOR.—That is a strong argument against supposing that anything that was so before is included in the designation of "Rupert's Land."

Mr. ROBINSON.—

"And thereupon it shall be lawful for the Parliament of Canada, from the date aforesaid, to make, ordain and establish, within the land and territory so admitted as aforesaid, all such laws, institutions, and ordinances, and to constitute such courts and officers, as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein; provided that until otherwise enacted by the said Parliament of Canada, all the powers, authorities and jurisdiction of the several courts of justice now established in Rupert's Land, and of the several officers thereof, and of all magistrates and justices now acting within the said limits, shall continue in full force and effect therein."

Now, remember that that was authorizing the Dominion to make laws "for the peace, order and good government" of that country; in other words, that the government of that country was placed under the Dominion.

Sir MONTAGUE SMITH.—Then that leaves the boundaries of that country just the same.

Mr. ROBINSON.—If it belonged to Ontario.

* There was no definition of the boundaries, nor, for the purposes of the surrender, was there any necessity for such definition, for the reason that the transfer to Canada by the Imperial Crown was to comprehend all the parts of British North America outside the limits of the established Provinces, and what was not embraced in the surrender under the designation of Rupert's Land, was embraced in it under the designation of the North-Western Territories, and Canada thus became possessed of the undivided whole. And, as pointed out elsewhere, Ontario's contention in regard to the words of the Rupert's Land Act—"held or claimed to be held"—upon which the argument of counsel is based, was that the clause should be construed as if it read: "For the purposes of this Act, the term 'Rupert's Land' shall include the whole of the lands and territories *rightfully* held, or *rightfully* claimed to be held, by the said Governor and Company.

Sir MONTAGUE SMITH.—That is the question; then, it is not part of Rupert's Land. Whatever was part of Ontario was already in that Province.* Then Rupert's Land was made part of the Dominion. The boundary between Rupert's Land and Ontario is what we are trying to get at. They cannot claim to hold what belonged to somebody else, unless they make out their title.

Mr. ROBINSON.—I say that the result may be this, that after all the negotiations, after the acquirement of this territory, described as it is described by that description, including that which Ontario now claims, Ontario may come and say "Part of that property which was purchased by the united funds belongs to me."

The LORD CHANCELLOR.—No; they would not say it was part of that property.

Sir MONTAGUE SMITH.—You assume complex propositions which they deny.

Mr. ROBINSON.—I submit that I am able to prove, and that I have proved, that they claim it as part of their property. Of course, if I have not proved it, my argument fails.

Sir MONTAGUE SMITH.—Supposing that any part was formerly a part of Canada, do you mean to say that it ceased to be Canada and became part of Rupert's Land?

Mr. ROBINSON.—I say any part which the Company claimed to hold at the time Canada came into the confederation ceased to be a part of Canada therefrom.†

The LORD CHANCELLOR.—If it does not apply to the whole, why does it apply to part?

Mr. ROBINSON.—I pass now to the question of the commissions, which your Lordships directed my attention to some time ago.

Lord ABERDARE.—From 1791 onwards?

Mr. ROBINSON.—Oh, from before that—from 1774. Now, in the first place, they say that the Quebec Act defines the bounds.

The LORD CHANCELLOR.—Supposing these commissions shew what was understood by the Crown of England to be within these boundaries, and what was acted upon as being within these boundaries, does it not require that we should take the two things together?

Mr. ROBINSON.—Yes; but I say, whatever is the meaning of the Quebec Act, that defines the boundaries. I say wherever the commissions are inconsistent with the Quebec Act they cannot claim to change it, or affect it in any way in its operation.‡ I say, wherever the commissions are uniform, it may well be that they in some way throw some light upon the Act and explain it; but the only benefit that we derive from them, in our view, is that they do explain the Act.

* And if already in that Province, then already also in the Dominion, and not therefore a part of Rupert's Land.

† This extraordinary proposition, that a part of the undoubted territory of the Province of Canada ceased to be Canada, simply because the Hudson's Bay Company "claimed to hold" it as part of Rupert's Land—as they did by their "Statement of Rights" and map of 1850—amply justifies Ontario's construction and reading of the Rupert's Land Act:- "lands and territories *rightfully* held, or *rightfully* claimed to be held," by the Company.

‡ Ontario dissented from this proposition in so far as the question of boundary was concerned, and maintained that—leaving aside the case of a restriction or narrowing of boundaries fixed by statute, which, moreover, did not arise here—it was quite within the competency of the Crown—of the Soverign in Council, by Order, by Commission, by Proclamation—to enlarge the boundaries of a Province; and that, therefore, even if the Province of Quebec was limited, on the west, to the due north line, by the Act of 1774, its limits were extended to the Mississippi by the commissions of 1774 and 1777, and to the meridian of the true source of the Mississippi by the commission of 1786. In the same way Ontario claimed that if, north of the sources of the Mississippi, the Province of Quebec—and the Province of Upper Canada—did not already extend, westward and northward, to the limits of the French occupation, they were so extended by the Orders in Council and Proclamation of 1791.

The commissions themselves are inconsistent with one another.* They are consistent with one view and inconsistent with another view. In the first place, the commission of 1774† requires no more explanation, because it has been given fully already. The commission goes northward along the eastern bank of the Mississippi, and I have said all I have to say about that. Our contention is that the commission is clear and that the Act is inconsistent with it.‡ That is my argument about that. Now the next is the commission of 1786.§ That was the commission to Sir Guy Carleton.

The LORD PRESIDENT.—The boundary laid down in this commission is entirely independent of the north line and the junction of the two rivers.

Lord ABERDARE.—Remember, this is after the separation.

The LORD PRESIDENT.—Yes; it has nothing to do with the due north line.

Mr. ROBINSON.—No. Of course it had to start from a different point, because all the southern territory had been conceded. Then the first distinction between the commission of 1786 and the commission of 1774 is this. The first commission differed from the Act, going to the Mississippi and then going along its eastern bank.‡ The next commission goes back to the wording of the Act curiously—it goes to the Mississippi and then goes northward without saying going northward "along the eastern bank of the" Mississippi. It is a curious thing. We may say, on our side, that that shews that the framers of the commission did not intend to depart from the wording of the Act in their first commission.‖

The LORD CHANCELLOR.—As a matter of fact, the whole course of the Mississippi had been ceded to the United States. It was evident that that was not understood at the time.

Mr. ROBINSON.—Downwards,¶ my Lord.

The LORD CHANCELLOR.—But that was so in point of fact?

Mr. ROBINSON.—Yes, that was so in point of fact—downwards.¶ The commission of 1786 goes back to the wording of the Act, so far as the Mississippi is concerned—it says, if I recollect rightly, that the boundary goes "on a due west course to the River Mississippi, and northward to the southern boundary of the" Hudson's Bay Company's territory.**

Sir ROBERT COLLIER.—"To the Lake of the Woods, thence through the said lake to the most north-western point thereof."

The LORD PRESIDENT.—Whatever it is, it carries the limits of "our Province of Quebec" as far as the Lake of the Woods, and further westward.

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* Counsel did not specify the particulars; but a comparison of the texts shews that the contention is not borne out by the actual facts. See *ante*, p. 238, note §.

† Printed *ante*, p. 40.

‡ The argument of Ontario was, that the Act was in itself clear, and did not require the aid of the commission to carry its boundaries up the Mississippi to its source; and that they were therefore in harmony.

§ Printed, *ante*, p. 44. Another commission, that of 1777, to Governor Haldimand, intervened. The boundary description was in the exact terms of that of the commission of 1774 (Joint App. 384).

‖ Ontario pointed to this commission as conclusively establishing its interpretation of the word "northward" in the Quebec Act, for by it the westerly boundary of the Province is described as abutting upon the north-western point of the Lake of the Woods. This, of course, pre-supposes that the original boundary must have been drawn from the junction with the Ohio along the banks of the Mississippi to, at all events, this point of latitude. This being so, the argument goes further, and claims, as a legitimate inference, not only that the term "northward" is to be taken to mean northward along the bank of the river, but that in this commission it also serves to interpret the meaning of the same term in the Act itself.

¶ In point of fact, the cession to the United States by the treaty of 1783, was limited "by a line to be drawn along the middle of the said River Mississippi," not through its whole course to its mouth in the Gulf of Mexico, but only "until it shall intersect the northernmost part of the thirty-first degree of north latitude." This line of latitude was the then northern limit of Florida, not yet come into possession of the United States.

** See *supra*, note .

Lord ABERDARE.—We have been told that the supposition was that the Mississippi was west of the Lake of the Woods, but would not this seem to extend the boundary from the Lake of the Woods to the point where the Mississippi goes.

Mr. ROBINSON.—Nothing could be plainer.

The LORD CHANCELLOR.—Then it turns out that that was an error—you cannot find any western point in that way—and that the arbitrators were therefore right in stopping at the extreme point as a correct description.

Lord ABERDARE.—Yes; at the same time it shews that in the minds of those who were putting the construction, that there was something west of the Lake of the Woods.

The LORD CHANCELLOR.—Yes.

Sir ROBERT COLLIER.—After indicating the due west course to the Mississippi, it then goes on "northward to the southern boundary of the territory granted to" the Hudson's Bay Company.

The LORD CHANCELLOR.—I should read it as if expressed thus: "thence through the said lake to the most north-western point thereof, and if the river Mississippi runs to the west thereof, then on a due west course to the said river, and northward, by the said River Mississippi, to the southern boundary of the territory granted to" the Hudson's Bay Company.

Sir ROBERT COLLIER.—It assumes the Mississippi to be northward of the southern boundary of the Hudson's Bay Company's territory.*

Mr. ROBINSON.—Both the commission and the treaty were founded upon a geographical mistake.

The LORD CHANCELLOR.—It is so, no doubt.

Mr. ROBINSON.—We all know that if you were to go due west from the angle of the Lake of the Woods you would not touch it; therefore we point to a commission which is plainly founded on an error. If they had recognized the height of land then, they never would have drawn this commission in these terms. Nobody in the world can question that. Then, what weight is to be attached to a commission which is founded on an error?† What we say under the circumstances is, that that commission cannot affect the Act; that is what we say.

The LORD PRESIDENT.—It is quite accurate as to the southern boundary, from Lake Superior to Long Lake and the Lake of the Woods.

Mr. ROBINSON.—You cannot get at that without interfering with the rights of the Hudson's Bay Company. If their rights are what I have said, if the Hudson's Bay Company are entitled to the height of land‡ (I do not want to go back to that)—the Crown could not take it from them by a commission.§

* But that would bring the boundary of such territories to the southward of the height of land; and even the company never claimed that.

† Counsel might as well ask, What weight is to be attached to a treaty which is founded on an error? For, in this respect, this commission of 1786, which was the first commission issued after the treaty of 1783, simply follows the description of the international boundary laid down in that treaty. That error in the treaty arose, it is known, from its framers having for their guidance Mitchell's map of 1755, which indicated that the Mississippi had its sources in about lat. 50° and long. 105°. (*Ante*, p. 107; Notes on Maps, Ontario App. 114). As the treaty description was held good, and remained undisturbed, as far westward as the most northwestern point of the Lake of the Woods, so the description in the commission remained good up to the same point.

‡ Ontario opposed this theory of the height of land as unsupported by any tittle of evidence, and it had already—when put forward by the counsel for Manitoba at an earlier stage of the argument—been emphatically disposed of by their Lordships as untenable.

§ Ontario pointed to the commissions as very solemn acts of state, guarded by extraordinary formalities, (see some particulars thereof, *ante*, p. 365, note *) and to this particular commission as evidencing that in the mind of the Crown the company were not justly entitled to so extensive a territory. And as to counsel's contention, that "the Crown could not take it from them by a commission," Ontario claimed that the supposed case had not arisen, as the Company's charter rights had not extended to the territory in question, but that, if they had, it would have been competent for the Crown, in the circumstances of the case, to take away by commission what had been granted, or purported to be granted, by charter.

The LORD CHANCELLOR..—We have strong evidence that the Crown did not regard the territory of Rupert's Land as including this district, and that it was not acted upon as including this district.

Mr. ROBINSON.—They did not know where the height of land was, any more than they knew where the source of the Mississippi was.

Sir MONTAGUE SMITH.—If they meant the height of land, why did they not say so? Because it was capable of being clearly ascertained.

Lord ABERDARE.—Your contention I suppose would be, that they supposed the Lake of the Woods went in a southerly direction.

Mr. ROBINSON.—Yes. There was a mistake altogether as to where the line of the water was. I am not going back to that.

The LORD CHANCELLOR.—This commission is, as nearly as possible, one hundred years old.

Mr. ROBINSON.—I cannot strengthen my argument by a repetition, and as long as my argument is understood, I will not say anything more.

The LORD CHANCELLOR.—The argument on the evidence you have put forward about that, seems to me to be wholly beside the question.

Mr. ROBINSON.—Of course the commission in question was issued on the theory that the source of the Mississippi was in a different place altogether. There can be no mistake about that.

Sir ROBERT COLLIER.—Yes.

Mr. ROBINSON.—And if the construction of the Hudson's Bay Company's charter is to give to them the height of land* you cannot take it from them by commission.† That is what I say upon that, the subject being the most important branch, or one of the most important branches at all events, of the discussion of this subject in the view taken by the Dominion. I think it has been always said to be an established proposition of law, that it is impossible to question the assertion that no commission can interfere with an Act of Parliament which, by itself, is clear.‡

Then we come to the end of 1791. A great deal has been said about that, and there again is an instance of the inconsistency of these commissions, and the danger of founding any argument upon them, because they vary from each other.§

Lord ABERDARE.—You come to another class of questions.

Mr. ROBINSON.—The Act of 1791 is what is generally termed "the Constitutional Act."

Sir MONTAGUE SMITH.—Page 393, is it not.?

Mr. ROBINSON.—Yes, but I ought, before speaking to those, remind your Lordships that there is a commission put in to Mr. Johnson, I think in respect of the territory of Illinois, which was referred to by my friends as strengthening their construction of the Quebec Act. That is to be found at page 383.‖ In the first place there is a singular circumstance connected with that, and that is, that they are all commissions to Lieutenant-Governors. The one to Mr. Johnson your Lordships have already had. That has been referred to by my friends as strengthening their construction of the Quebec Act, and their view that Illinois was included.¶

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* See *ante*, p. 380, note ‡.

† See *ante*, p. 380, note §.

‡ This is not a question of an Act of Parliament, but of the charter of Charles II.: and see *ante*, pp. 378, note ‡, 380, note §.

§ The inconsistency has not been shewn. Ontario shewed that there was, in fact, none; that any apparent variation was explainable, and had been explained.

‖ Printed *ante*, p. 134.

¶ See *ante*, p. 356, note *.

Sir ROBERT COLLIER.—That goes against the due north line.

Mr. ROBINSON.—Yes. What I want to point out to your Lordships as a curious circumstance is that if you look at page 385,* there is an item :

"To Philip De Rocheblave, Esq., for his salary as commandant of the Illinois from the 13th January, 1784, to the 13th January, 1785, pursuant to Lieutenant-Governor Hamilton's warrant, dated 2nd March, 1785—£200.

Against that is put :

"To this article I cannot assent, as it is unprecedented, and as it introduces a new appointment upon the civil establishment of the province, and the more especially as His Excellency Governor Haldimand declined issuing warrants for the six months ending 1st of November, 1784, for the salaries of Lieutenant-Governors Abbot and Johnson, though commissioned by the King, as St. Vincent and the Illinois were without the limits assigned to the province by the definitive treaty, and not occupied by the King's troops or subjects."†

I point to that remark to say that I myself am not able clearly to understand it.

Lord ABERDARE.—St. Vincent is within that line.

Mr. ROBINSON.—St. Vincent is within the Illinois.‡

Mr. MOWAT.—The explanation is, that it ceased to be British territory under the treaty.

Mr. ROBINSON.—No; he says it was "without the limits assigned to the province by the definitive treaty." The definitive treaty has generally been spoken of as the Treaty of Paris of 1763. That is what has been called the definitive treaty.

The LORD CHANCELLOR.—No; it is made perfectly intelligble there.

Lord ABERDARE.—It means the last treaty there.

Mr. ROBINSON.—If it means the last treaty there, of course that makes it clear; but the one that has been so spoken of throughout this book is the treaty of 1763. I can shew your Lordships that in many places.

The LORD CHANCELLOR.—It agrees with the fact. It is without the limits defined for the province.

Mr. ROBINSON.—By the treaty of 1783 ?

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* Minutes of the Council of State for the Province of Quebec, 23rd May, 1785. On Monday, the 23rd May, 1785, at the council chamber in the Bishop's Palace :

Present : The Hon. Henry Hamilton, Esq., Lieutenant-Governor and Commander-in-Chief, Hugh Finlay, Thomas Dunn, Edward Harrison, John Collins, Adam Mabane, George Pownal, J. G. C. DeLery, Henry Caldwell, Francis Baby, and Samuel Holland, Esqrs.

Mr. Finlay, chairman of the Committee on the Public Accounts of the Province, presented a further Report, which was read together with the former Report.

Mr. Mabane read, and delivered to be entered on the minutes, the following paper, viz :

"I observe in the Acting Receiver-General's account current, an article of the 3rd March, 1785, viz.:

"'To Philip De Rocheblave, Esq., for his salary as commandant of the Illinois from the 13th of "'January, 1784, to the 13th January, 1785, pursuant to Lieutenant-Governor Hamilton's warrant, "'dated 2nd March, 1785 ..... £200.'

"To this article I cannot assent, as it is unprecedented, and as it introduces a new appointment upon the civil establishment of the province, and the more especially as His Excellency Governor Haldimand declined issuing warrants for the six months ending 1st of November, 1784, for the salaries of Lieutenant-Governors Abbot and Johnson, though commissioned by the King, as St. Vincent and the Illinois were without the limits assigned to the province by the definitive Treaty, and not occupied by the King's troops or subjects. "A. MABANE."

[Lieutenant-Governor Hamilton transmits the minutes with a statement of the facts to Lord Sidney, Secretary of State, by despatch of 9th June, 1785. In this he shews that Sir Guy Carleton and, after him, General Haldimand, had allowed these payments, and that they had been continued by himself and had always passed the Treasury. (Joint App. 385. Public Record Office, Colonial Office Records, America and West Indies, Canada, 1785, No. 519.)]

† This is the protest of one only of the Councillors—Adam Mabane.

‡ This place, otherwise called Saint Vincenne or Post Vincenne, was on the Wabache, on its left bank, and therefore not within the limits of the Illinois. It was a separate Lieutenancy, and the commission to Edward Abbott as first Lieutenant-Governor is printed in the Joint App. 382. See *ante*, p. 356, note *.

Lord ABERDARE.—It could not be said that it is within the treaty of 1783.

Mr. ROBINSON.—If it was the treaty of 1783, it is intelligble, but it is not what is called the "definitive treaty."* Although there is a commission to Governor Johnson, and this was in the Illinois, there seems to be no commission for this territory up to the northward. One would expect to find commissions for the Government of that territory as well as for that of Illinois. That shews that it is not taken as being within the country.† Now I pass to the Act of 1791, which your Lordships will find at page 393.

Sir ROBERT COLLIER.—That divides the two provinces.

Mr. ROBINSON.—Yes, that divides the two provinces.‡ Now it has been said that that Act extends the limits under any circumstances. In the first place you will find that the Act does not profess in any way whatever to extend or to diminish the Province of Quebec. It simply says that

> "His Majesty has been pleased to signify . . . his Royal intention to divide his Province of Quebec, into two separate provinces."

Now that would authorize no Order in Council which did more than divide the Province of Quebec, if there were any such Order in Council.

Lord ABERDARE.—I suppose there is always some ambiguity in what the meaning of the Province of Quebec is, because the Province of Quebec, as first constituted, was very far from covering the whole of the territory ceded by the French, and when you say the Province of Quebec here, in the Act of Parliament, it means the whole of the territory ceded by France.

Mr. ROBINSON.—I should think it meant the Province of Quebec as formed by the Quebec Act.

The LORD CHANCELLOR.—It does not deal with the south-western boundary, but with the north-eastern boundary, and it is material to observe the language of this, which perhaps might have been equivocal if the other commissions had not given construction to it.

Mr. ROBINSON.—Yes, my Lord. Now, a great deal has been said about the effect of that Act. It has been said that the Act, in connection with the Order in Council issued upon it, did extend the Province of Quebec, whatever it might have been before 1774. All we have to say is that the Statute itself does not more than divide the Province of Quebec.‡ It recites the Province of Quebec, as formed by the Act of 1774

The LORD CHANCELLOR.—Is there any inconsistency between the two, if the boundary between the Hudson's Bay territory and the French territory was stated? Supposing, for instance, that the French territory is regarded as running up, in accordance with the line of the Award, to Hudson's Bay, is there any inconsistency in any part of the language of the Quebec Act and this language?

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* But it *is* so called. As a matter of fact, the Treaty of Paris and the Treaty of Versailles are each known by this appellation, and so appear in the Joint Appendix: "The definitive Treaty of Friendship and Peace . . . concluded at Paris the 10th of February, 1763," and "Definitive Treaty of Peace and Friendship . . . signed at Paris, the 3rd of September, 1783." (See *ante*, pp. 36 and 43).

† The commission for the Illinois was to the Lieutenant-Governor "of the post and its dependencies.' These dependencies probably embraced the posts of the Upper Mississippi, formerly tributary to La Baye, or to Michillimackinac. Then there was a commission to the Lieutenant-Governor of Missilimakinac, which place probably had jurisdiction over all the northern settlements: "Michilimackinac is the place of deposit and point of departure between the upper countries and the lower. Here the outfits are prepared for the countries of Lake Michigan and the Mississippi, Lake Superior and the North-West, and here the returns in furs are collected and embarked for Montreal." (Alexander Henry's Travels, 1760-1776, quoted in Ont. App. 49.)

‡ The limits of the two Provinces of Upper and Lower Canada were set, in 1791, not by the Act in question, but by the King in Council.

Mr. ROBINSON.—If we regard the French territory as running up to the line of Hudson's Bay, and the French rights as thereby overriding the rights of the Hudson's Bay Company, there may not be.*

The LORD CHANCELLOR.—Therefore it depends on the fact. The suggestion of inconsistency involves a hypothesis of fact, viz., that the Hudson's Bay boundary did not coincide with the award line, or at all events that it did not carry the French territory in Canada to the shore of Hudson's Bay. But that is a thing to be proved. It is not proved by the language of the Quebec Act.

Mr. ROBERTSON.—I do not wish to go back, but your Lordship will see—

Sir MONTAGUE SMITH.—I think you are trying to meet an argument which you suppose was used on the other side, viz., that this Act extended the boundary.

Mr. ROBINSON.—Yes, that is what I mean.

Sir MONTAGUE SMITH.—I do not know that that was argued.

Mr. MOWAT.—Not the Act itself.

Mr. ROBINSON.—I certainly recollect that argument often having been used, and I thought it was used at the bar.

Sir ROBERT COLLIER.—You are fighting a shadow, I do not think it was argued here.

Mr. ROBINSON.—I know it certainly has been contended.

Sir MONTAGUE SMITH.—It has not been contended at the bar.

Mr. ROBINSON.—I certainly have heard the contention very often.†

Sir MONTAGUE SMITH.—It was not contended here‡ You say although it has been contended that this Act extended the boundary, it was merely an Act for the division of the whole Province of Quebec into two.

The LORD CHANCELLOR.—It was rather put forward as evidence of what the boundary of Quebec was. The words are, "From the head of the said lake" (that is Lake Temiscaming) "by a line drawn due north," (which is certainly the line we have here; the blue on the one side and the red on the other) "until it strikes the boundary line of Hudson's Bay." Well, of course we may say that the meaning of that is one thing or the other, but at all events it gives you the boundary between the two provinces up to that point. Well, that point is, the shore of the bay, or it is the boundary line, wherever that might have been, of the Hudson's Bay territory. You of course say the latter, and that that did not coincide with the shore of the bay.

Mr. ROBINSON.—Yes, my Lord.

The LORD CHANCELLOR.—There is no doubt something to be said upon your side; for instance there is the *prima facie* force of the words "boundary line" as distinguished from the "coast" or "shore." Now, I should like you to address yourself to the question whether you find a similar description to that in the commission of 1838* in any place connected with this dividing Act, upon which those commissions must have depended.

Lord ABERDARE.—I have looked through the Quebec Act, and the commissions founded upon the Quebec Act, and I find there that the Hudson's Bay Company, whenever they are mentioned, are described as "The Merchants Adventurers of England trading to Hudson's Bay," and the first mention of "boundary line" is when you come to 1791.

*Ontario claimed that the Imperial Crown held in itself, at this time, every rival territorial interest, French and English, and was competent to deal with the regions referred to without regard to any supposed rights or claims of the Company. See *ante* p. 190, note †.

†See *ante*, pp. 378, note ‡, 380, note §.

‡Lord Durham's commission, which described Upper Canada as extending to "the shore of Hudson's Bay."

Mr. ROBINSON.—Yes, that is in the commissions.*

Lord ABERDARE.—On one occasion, and on one occasion only, so far as I can see, the boundary is described as the boundary of the territory granted to the Company trading to Hudson's Bay,† but that was not the description finally adopted on the Act. It was "the boundary line of Hudson's Bay."

The LORD CHANCELLOR.—It is very remarkable, by the way, and ought not to be overlooked, that before this Act was passed, there was a paper‡ ordered by the House of Commons to be printed, on the 21st April, 1791, which proposed to make the line a line "running due north, to the boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

Lord ABERDARE.—That is what I have quoted just now.† The commission is not so precise. It simply states "the boundary line of Hudson's Bay," and you will find afterwards that it is the first,‡ and not the second, definition† that is invariably adopted, till you come down to the time of Lord Durham;§ and from that time forward it is always "the shore" of the bay.

Mr. ROBINSON.—Quite so.

The LORD CHANCELLOR.—But it by no means follows, from that, that the territory granted to the Merchants' Adventurers of England trading to Hudson's Bay in this description—granted to them, and in their possession—did not coincide with the line drawn at Hudson's Bay. The two might be perfectly consistent.

Lord ABERDARE.—You will find in all the Orders in Council afterwards, that the definition in the second† is not adopted. It shews that it was before them, but they did not adopt it.

Sir BARNES PEACOCK.—That is so, but probably it was thought to be the same thing, because here was the boundary in 1701.

Lord ABERDARE.—I do not know that. When you come to find that upon subsequent documents the word "shore" is substituted for "boundary" it seems material.

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* The expression is used in the Paper presented to Parliament, and in the two Orders in Council, then in the Commission and in the Proclamation—all of 1791.

† The reference is to the following paper, which is No. 46, among "Papers relating to the Province of Quebec," ordered by the House of Commons to be printed, 21st April, 1791. It is not the paper referred to in the Order in Council of 1791 as having been presented to Parliament. But it was before Parliament, and the significance of it lies in this, that the authorities rejected this description, which carried the inter-provincial line "to the boundary of the territory granted to the" Hudson's Bay Company, wherever that might be, and deliberately adopted the description of certainty which appears in the Orders in Council and Proclamation, and was intended to shew that the limits of the province extended to the shore of Hudson's Bay, and to the utmost bounds of the Canada of the French:—"A line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada." The paper is as follows:

"*Description of the intended boundary line between the Provinces of Upper Canada and Lower Canada.*

"The boundary line to run due south, from a stone boundary fixed on the north bank of the lake Saint Francis, in a cove of the river Saint Lawrence, west of Pointe-au-Boudet, in the limit between the Township of Lancaster and the Seigniory of New Longueuil, to the southernmost extent of His Majesty's dominions, and in a northerly direction from the aforesaid stone boundary, along the western or inland bounds of the said Seigniory of New Longueuil, and of the Seigniory of Vaudreuil, according to the various courses, until it strikes the Ottawas River; thence in a direct line to the nearest point in the centre of the navigable channel of the said river; thence, ascending the middle of the navigable channel of the said river, to the Lake Temiscaming; thence, through the middle of the said lake, to the most northerly extremity thereof; and thence, running due north, to the boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay."

‡ The reference is to the Paper presented to Parliament, previous to the passing of the Act of 1791, describing the boundaries of Upper Canada, and particularly the line of division between Upper and Lower Canada, as adopted by the Order in Council establishing the two Provinces. The Paper is printed *ante*, pp. 46-48. The reference to it in the text as the first definition, and to the paper in note §. *infra*, as the second definition, is explained by the papers being numbered (1) and (2) respectively where they appear in the Joint Appendix, pp. 393-4.

§ Lord Durham's commission is printed, *ante*, p. 308, note §.

The LORD CHANCELLOR.—It seems to be possible that the legislature deliberately adopted the words "boundary line of Hudson's Bay," rather than the others, because, regarding them as practically coincident, the one phrase was more expressive than the other, and more geographically correct.

Mr. ROBINSON.—Then, my Lord, if no argument is founded on the Act of 1791, I pass it by; but if not upon the Act, I understood that some argument was founded upon the Orders in Council issued under the Act.*

The LORD CHANCELLOR.—Where is that?

Mr. ROBINSON.—There are two Orders in Council. They are at pages 397 and 399. The Act gives no boundaries at all; it professes only to divide the Province of Quebec;† the Orders in Council specify the line of division. There are two Orders in Council. One of them speaks of "the line of division described in the paper, a copy of which is hereunto annexed." That description is this:

"To ascend the said [Ottawas] River into the Lake Temiscaming, and from the head of the said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada."

Then your Lordships will find, at page 400—

Sir ROBERT COLLIER.—First of all take the bottom of page 399: "The proposed line of division"

Mr. ROBINSON.—Yes, my Lord, the words that are of any importance there are these:

"Including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada."

They refer to "the name of Canada."

Sir ROBERT COLLIER.—

"A line drawn due north until it strikes the boundary line of Hudson's Bay."

Mr. ROBINSON.—Quite so, that is the phrase used in the Order in Council.

The LORD CHANCELLOR.—You have passed over page 398, but there is something there which seems deserving of attention. It appears the Right Honourable Henry Dundas had addressed a letter‡ to the Lord President, enclosing copy of a Paper§ presented to Parliament previous to the passing of the Act, describing the line proposed, that being the Paper in which the words "until it strikes the boundary line of Hudson's Bay" occur. Then that Order follows—"from the head of Lake Temiscaming by a line drawn due north until it strikes the boundary line of Hudson's Bay"—taking the language of that paper and not of the other. Then comes the Order in Council at page 398:

"The Lords of the Committee, in obedience to your Majesty's said Order of Reference, this day took the said letter into their consideration, together with the Act of Parliament therein referred to, and likewise copy of the said Paper describing the line proposed to be drawn for separating the Province of Upper Canada and the Province of Lower Canada; and their Lordships do thereupon agree humbly to report us their opinion to your Majesty, that it may be advisable for your Majesty, by your Order in Council, to divide

* The Attorney-General's argument upon these, together with the Orders in Council, at pp. 45-50, *ante*.

† The Act does not profess to do even this. It recites that "Whereas His Majesty has been pleased to signify, by his Message to both Houses of Parliament, his Royal intention to divide his Province of Quebec into two separate Provinces," etc. The King in Council determined the limits accordingly.

‡ Printed *ante*, p. 46.

§ Printed *ante*, p. 47.

the Province of Quebec into two distinct provinces, by separating the Province of Upper Canada and Province of Lower Canada according to the said line of division described in the said Paper."

Mr. ROBINSON.—Yes, my Lord, but we say that that Order in Council cannot affect the Act of the legislature.

The LORD CHANCELLOR.—It expressly says, "according to the said line of division described in the said Paper."

Mr. ROBINSON.—Yes, my Lord, I have those words marked, and it seems to me they support my contention. It comes to this, it seems to me, in the end. That in the Act of 1791 no boundaries are mentioned; in the Order in Council issued upon it boundaries are mentioned. What we say is that in so far as these boundaries differ, if they do differ at all from the boundaries of the Quebec Act, they cannot affect that Act, because words in an Order in Council cannot affect the Act of legislature.*

Lord ABERDARE.—But the boundaries of the Quebec Act have nothing whatever to do with the separation of the two provinces.

Sir MONTAGUE SMITH.—But what the learned counsel says is that the Province of Quebec was fixed by that, and this only divides it.

Mr. ROBINSON.—Only divides what was really the original Province of Quebec. It is no changing of its boundaries.

Lord ABERDARE.—But surely the Quebec Act is utterly silent as to this portion of the territory.

Mr. ROBINSON.—I am speaking of the southern boundary of the Hudson's Bay territory. The Act of Quebec fixes that and the northern boundary.†

Lord ABERDARE.—At this particular place?

Mr. ROBINSON.—Yes; at least I take it altogether.

The LORD CHANCELLOR.—The Quebec Act fixes no doubt the southern boundary of that which is regarded as the Hudson's Bay territory, but it does not shew exactly what that southern limit is; and surely these subsequent Acts go a long way to shew what, in point of fact, was reputed and acted upon as being that southern limit.

Sir MONTAGUE SMITH.—You say in some respects they vary, but you get a tolerably consistent stream of interpretation from the Act down to quite modern time.

The LORD PRESIDENT.—This is a new expression here, "to the utmost extent of the country commonly called or known by the name of Canada."

Mr. ROBINSON.—We are either right or wrong in saying that the Hudson's Bay charter went from the mouth of the Bay to the height of land.

The LORD CHANCELLOR.—You say that nothing which afterwards passed could overrule that Act.

Mr. ROBINSON.—Yes.

Sir MONTAGUE SMITH.—That underlies all your argument.

* Ontario pointed out that a Paper "was presented to Parliament, previous to the passing of the said Act, describing the line proposed to be drawn for dividing the Province of Quebec into two separate provinces, agreeable to your Majesty's Royal intention, signified by Message to both Houses of Parliament," and that therefore the description in question had the approval of Parliament as clearly as if it had been embodied in the Act.

Then Ontario claimed that even if it were conceded for argument's sake, that an Order in Council could not circumscribe, so as to reduce to narrower limits, the boundaries fixed by Act of Parliament, yet it was quite within the competence of the Sovereign, with the advice of his Privy Council, to make an Order for enlarging those boundaries; and that if the Province of Quebec had not the limits contended for by Ontario by virtue of the Act of 1774, it had—or Upper Canada had—those limits by virtue of the subsequent acts of the Crown and Parliament—the Act and Proclamation of 1791 and the series of Royal Commissions and Instructions and Orders in Council.

† That is counsel's theory merely, for the Act gives no definition.

Mr ROBINSON.—That underlies all my argument.*

The LORD CHANCELLOR.—In considering that, we must look to possession, and occupation, and enjoyment, and *de facto* use of the land.

Mr. ROBINSON.—Yes. Then, my Lords, I could not do more than repeat my argument, and I do not wish to do that. I have spoken as regards occupation and enjoyment, and as regards the construction of the Hudson's Bay charter. If I am wrong in that, I fail.

Sir ROBERT COLLIER.—I think your argument is very clear.

Mr. ROBINSON.—I cannot put the thing otherwise in any way at all. If I am right in what I have put to your Lordships with regard to the Hudson's Bay Company's charter, and the strong, explicit and clear recognition by the Crown not only of the charter but of the limits which the Hudson's Bay Company were entitled to claim under the charter, I have established sufficient for my purpose. The Hudson's Bay Company in the year 1719 had clearly been recognized by the Crown as entitled to the country to the height of land.† Then, if I am right in saying that, no subsequent Orders in Council, no subsequent Commissions, can take away from that Company any portion of their rights.‡ If I am wrong in that, of course my argument fails. I cannot strengthen it any way that I know of. It has always seemed to us in that respect to be clear, that nothing could be stronger than the recognition by the Crown of their charter, and the assertion by the Crown of the boundary of the country which they had granted.

Sir MONTAGUE SMITH.—You say it is perfectly clear what the grant was, and that therefore these, so far as they depart from or are inconsistent with it, are of no avail.

Mr. ROBINSON.—Yes, my Lord, we say not only that it is clear what the Crown asserted it did grant; and we say, it having been granted, and the construction having been placed upon it by the Crown, it is impossible by subsequent commissions or executive acts, to take away from them any portion of their rights;‡ and that inasmuch as Ontario's rights by the Quebec Act are dependent on their rights, Ontario goes to the boundary of the territory granted to them, wherever that territory be.

I should pause for a moment at the Act of 1791, merely to point out to your Lordships that there is there again the same curious inconsistency. A great deal has been said upon the fact that that boundary, as fixed by the Order of Council is "including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada." Now, we have always thought that that meant Canada defined as founded and as established by the Quebec Act,§ because the Quebec Act, according

* See *ante*, p. 387, note *.

† It has been already shewn that the British commissaries exceeded their instructions in making this demand (*ante*, p. 368, note ‡). And see *ante*, p. 380, note ‡.

‡ As to Ontario's position in regard to this contention, see *ante*, p. 363, note †; in addition to which Ontario claimed that it was competent for the Crown, in the circumstances of this case, to make other disposition, by commission, or otherwise, of what it had already granted, or purported to grant, by charter. Commissions, as already pointed out, were solemn Acts of State, under the Great Seal, founded on, and approved by, Orders in Council. Ontario also pointed out that the Crown had frequently re-granted, by new charter, what it had purported to grant by earlier charters.

§ The documents printed in the Joint Appendix in connection with the establishment of the boundaries of Upper and Lower Canada, in 1791, shew that the Canada referred to was the Canada of the French in its full extent, except such portions of it, to the west of the Mississippi, as under the Treaty of 1763 was left to Louisiana. Moreover, it is made perfectly clear that the intention was to include all the unorganized British territory in this part of America. Mr. Grenville, in writing to Governor Lord Dorchester puts the idea in these words: "All the territories, etc., etc., possessed by and subject to His Majesty, and being to the west or south-west of the boundary of Lower Canada." Lord Dorchester, in his despatch

to the proper construction, took in everything that was known by the name of Canada.* But apart from that altogether, you will find that when the commission of Lord Dorchester comes to be issued under that Act, on the 12th September, 1791, they depart from the term Canada again and they say "including such territories as were part of our said Province of Quebec." Then you will find that when the Lieutenant-Governor, Alured Clarke, in 1791, issues his Proclamation declaring when that Constitutional Act of 1791 was to come into effect, he goes back to the expression "commonly called or known by the name of Canada." Then you find when that is transmitted to the Secretary of the Colonies, the Right Honourable Henry Dundas, it is pointed out to him that the commission of Lord Dorchester and the Order of Council differ.†

The LORD CHANCELLOR.—Not in any part that is material to this enquiry.

Mr. ROBINSON.—I cannot say whether it is material or not. We have never thought that it is material; I am only pointing out to you that these commissions differ from each other constantly. The answer is that it is not thought that the differences are material.‡ Then we find that after that, (and some importance seems to be attached to it), in 1838, the commission is issued to Lord Durham.§

The LORD CHANCELLOR.—I think this is of some importance, and perhaps you would like to deal with it. The Proclamation of Governor Simcoe, of 1792,‖ recites the Quebec Act, and amongst other things you will observe that it says: "The nineteenth of the said counties is hereafter to be called by the name of the County of Kent," which, as we have looked at the map, seems to be at the angle between Lake Erie and Lake Huron, right down to the south, but it is very little to the west of this line itself, and all the other counties are either in between it and the Ottawa River, or to the eastward of this dividing line. Then it goes on:

"That the nineteenth of the said counties be hereafter called by the name of the County of Kent, which county is to comprehend all the country, not being territories of the Indians, not already included in the several counties hereinbefore described, extending northward to the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada."

And in the Provincial Act of 1798, the Western District is said to consist of the Counties of Essex and Kent, and what is to the west of them. Now, speaking

of 8th February, 1790, to Mr. Grenville, encloses a proposed description: "The Province of Upper Canada to comprehend all the territories, lands and countries which are now subject to or possessed by His Majesty to the westward and southward of the said partition line,"—that is the line of partition between Upper and Lower Canada; and the Chief Justice of Quebec addresses to Lord Dorchester a letter, which the latter forwards to Mr. Grenville, in which he says: "If to your Lordship's description there be an addition importing that by Canada is meant whatever the French claimed as New France. . . . a clause to this effect is enclosed." The clause so enclosed runs: "And the country of Canada hereinbefore mentioned shall be deemed and adjudged to include all the dominions of New France as claimed by the French Crown before the conquest."

* The Canada of the French, as was contended by Ontario; but strenuously resisted by the opposing counsel, as is evidenced by their advocacy of the due north line and height of land theories.

† If, as claimed, the Province of Quebec was co-extensive with French Canada, the difference would be in name only and not in fact. Besides, as the Commission refers to, and purports to quote, the description from the Order in Council, it may fairly be argued that the description of the Order in Council governs and is to be taken as read into the Commission. Mr. Dundas, upon his attention being called to the difference in the terms used in the Order in Council and in the Commission, observes: "As the difference lies only in what is explantory, it does not, I conceive, amount at all to a variance between them, and is therefore perfectly immaterial." (Despatch to Lieutenant-Governor Alured Clarke, 10th April, 1792, Joint App. 403-4).

‡ It is not attempted to be shewn that this commission of 1791 is at variance with any earlier commission.

§ It is printed *ante*, p. 308, note§.

‖ Printed *ante*, p. 128.

broadly, the whole of the disputed territory, from that point to the west, and up to Hudson's Bay, is to the west of the angle between Lake Huron and Lake Erie.

Lord ABERDARE.—And it is partly to the northward ?

The LORD CHANCELLOR.—Yes. Although the County of Kent lies so much to the south, yet, as would be expected, it is thrown into connection with it.

Mr. ROBINSON.—That touches the west side, and not the north-east angle that I am now upon.

The LORD CHANCELLOR.—Yes, it does, because the line drawn from the County of Kent, although as it was drawn due north from the County of Kent it would not accurately coincide with this, yet would come very near it, if you understand the whole of the Western District to be thrown together, whatever its extent was, and not divided into counties.

Sir MONTAGUE SMITH.—The curious thing is that the County of Kent is not the westernmost part of this District. Essex is west of Kent.

Mr. ROBINSON.—Yes ; Essex runs down the River Detroit, if your Lordship will look at the map.*

Passing then from the Act of 1791, and from the Order in Council and the Commission issued under it, I will endeavour to point out the inconsistency in those, and to argue that it is impossible to rely upon this Commission for any definite description.

Now, the next thing we find is, that in 1838 a commission is issued to Lord Durham. Your Lordships will see that these commissions differ, and differ very materially, from the other commissions, because they go "until it strikes the shore of Hudson's Bay." The commission for Upper Canada gives its eastern limit as "a line drawn due north from the head of the said lake until it reaches the shore of Hudson's Bay." Now it has been said that commissions, whatever may have been the rights of the Hudson's Bay Company, practically took away from them their rights.

The LORD CHANCELLOR.—Still they are strong evidence of what those rights were.

Mr. ROBINSON.—Then they are constructive.

The LORD CHANCELLOR.—And they are also strong evidence of what was the true construction of the words, "until it strikes the boundary line of Hudson's Bay," in the earlier Commissions, and in previous Orders.

Mr. ROBINSON.—At all events, what I mean is this, it is said that the effect of them is to confine the Hudson's Bay territory to the shore at that point.

The LORD CHANCELLOR.—It is strong evidence that they were, in point of practice, so confined, according to the descriptions which are contained in those documents, and that the *de facto* boundary was consistent with that being the north-east boundary of Upper Canada. It is a question of evidence. It is not a question of taking away. It is a question of evidence as to the *status quo* of rights depending really upon possession and documents.

Mr. ROBINSON.—Yes. Now, in the first place we say that the Hudson's Bay Company's rights under their charter were settled long before that.

The LORD CHANCELLOR.—You say they did not depend upon possession or occupation under the charter ?

* As a matter of fact, Kent was as far to the westward in that quarter as Essex : they both faced the Detroit. The description shews that the southerly boundary of Kent was a line starting from Maisonville's mill on the River Detroit, and running inland four miles, and thence, at that distance, by a line running parallel to the River Detroit and Lake St. Clair, to the Thames. West of the Thames, Kent embraced, *inter al.*, the present County of Lambton, and so faced of course the River St. Clair and a part of Lake Huron, as well as Lake St. Clair and a part of the Detroit.

Mr. Robinson.—They depended upon the grant, recognized by the Crown.* In the next place, they say the result of that would be to take away from them the territory which they clearly did occupy at that time. Their forts are there. The history of their forts has been given, and if they owned any territory at all under their grant, they would unquestionably have owned the territory covered by those forts, which at that time existed, and which they have always held, and which they hold, as I understand, to this day.

The Lord Chancellor.—If they do that, it would not be inconsistent with its being within Canada. Fort Michipicoton is admitted to be in Canada.

Lord Aberdare.—And several other forts mentioned in that paper.

Mr. Robinson.—I am speaking now of the forts up at the north—the forts of James' Bay.

The Lord Chancellor.—If you are right in saying that they have to this day certain forts within the district here marked out as belonging to Upper Canada, there is nothing in that inconsistent at all, because we know that they extended to the southward.

Lord Aberdare.—There are forts on the side of the River St. Lawrence.

The Lord Chancellor.—In the paper recently read, the Government of Canada said that no obstacle had ever been thrown in their way, within the limits of Canada, to act exactly as they did elsewhere.†

Mr. Robinson.—In one paper on this subject which has been published, and which your Lordships will find at page 125 of the Appendix of the Province of Manitoba, I find the history of the forts there which are about this point. To begin with Fort Rupert, up at the north-east angle: "Fort Rupert, called by the French St. Jacques, founded in 1667 to 1668 by Gillam; taken by the French under de Troyes and d'Iberville, July, 1686; retaken by the English, 1693." As far as I know that fort has been occupied since.‡ Then, 2nd, "Fort Monsippi, Monsonis, St. Louis, or Moose Fort"—your Lordships will see that as the French took these forts they changed their names and gave them French names—"taken by de Troyes and d'Iberville about the 20th June, 1686; retaken 1693. 3rd, Fort Chechouan, Ste. Anne, or Albany"—changing again from the French name to the English—"taken by de Troyes and d'Iberville in 1686; retaken in 1693. 4th, New Severn, or Nieue Savanne, taken by d'Iberville in 1690. 5th, Fort Bourbon, Nelson or York, founded in 1670; taken by des Grozeliers and Radisson, acting for the French, in 1682; retaken by Radisson, acting for the English, in 1684; retaken by d'Iberville, 12th October, 1694; retaken by the English, 1696; and again by the French in 1697. It remained in the possession of the French until 1714, when it was given up under the Treaty of Utrecht. 6th, Fort Churchill, built 1688, and taken by the French in 1689."

The Lord Chancellor.—Is this one of your documents?

Mr. Robinson.—Yes.§

* There was no such recognition as tied the hands of the Crown to any specific territorial limits. And see *ante*, pp. 190, note †, 388, note ‡.

† Printed *ante*, p. 376, note *.

‡ Not at all. Fort Rupert had been abandoned by the Hudson's Bay Company from an early date—as early at least as 1747.

§The list of forts is from an *ex parte* confidential report of T. K. Ramsay, Esq., Q. C., to the Dominion Government, in 1873, on "The Northern and Western limits of Ontario:" He prepares the list as follows: "In 1700, the Company said that they had had seven forts, and that by the encroachments of the French there remained to them only one (Pownall Papers MSS.) Six of the seven only appear to have given rise to any contest; the seventh I presume to be East Main. The six others are:"—and then follows the list. In it there are several inaccuracies, as indeed is partly to be seen from the above preface which shews that in 1700 all the forts with one exception were in the hands of the French. The Company's memorial of 1711 shews the same state of things to have continued up to that year—as it did in fact till 1714. In the same memorial they also complain of an additional settlement made by the French: "That the only settlement now remaining to the Company, of seven they formerly had, is Albany Fort on the Chechewan,

The Lord Chancellor.—It is a little worthy of notice that certain forts are mentioned as being taken and retaken; and then, this fourth one, New Severn is taken in 1690, but there is nothing about its being retaken. And then Fort Nelson is taken, and given up in 1714 under the Treaty of Utrecht. So that with regard to the other forts nothing is said about their being given up under the Treaty of Utrecht. Some are said to have been retaken by the English after their capture by the French.

Mr. Robinson.—Yes. Your Lordship is aware that the French at a certain period did capture all the forts but one. I think that was Fort Albany. And that was the foundation of the complaint of the Hudson's Bay Company after the Treaty of Ryswick, that the French had in time of peace invaded their territory, and taken their forts, and they petitioned for redress. But as I understand it, if the assertion is that the commission issued to Lord Durham goes at that angle up to the shores of Hudson's Bay, it plainly takes from the Hudson's Bay Company the territory which they, beyond all question, had occupied, because they were there with these very forts. Surely they occupy the territory there by means of those forts; and surely they have acquired a title by occupation, which no commission could take from them. If occupation is necessary to give them rights under that charter, then they had occupation, and then they had acquired the rights, and no commission could take those rights from them.*

Then with regard to the distinction in those commissions, between "the shore of Hudson's Bay" and "the territory" of the Hudson's Bay Company, we have always believed that there was never any intentional difference in those words. Any person would say, naturally, the boundary of the bay is the shore of the bay. Any person not knowing or caring—as very possibly whoever it was who drew these commissions did not know or care—about the rights of the Hudson's Bay Company, seeing them go in one place to the boundary line of Hudson's Bay, would naturally say, "The boundary of the bay is the shore of the Bay, and it makes no difference." To say that simply by that change of phrase in a commission, territorial rights granted by charter are taken away,† seems to us to be saying that which can have no foundation in law.

Then, my Lords, if these commissions are in the one respect to affect the question, they must affect it in another respect. If these commissions are to be

where they are surrounded by the French on every side, viz.: by their settlements on the Lakes and Rivers from Canada to the northward towards Hudson's Bay, as also from Port Nelson (*alias* York Fort) to the southward. The French have likewise made another settlement between Port Nelson and Albany Fort, whereby the Indians are hindered from coming to trade with the English factory at the bottom of the Bay," etc. Fort Albany which is here stated to be the only place in their possession, the French were entitled to under the terms of the Treaty of Ryswick. Fort Rupert was really founded by the two renegade Frenchmen Radisson and Des Grosselliers accompanied by Gillam; then abandoned, but re-established by Baily in 1670. The French paralyzed its trade, and the Company's headquarters on the Bay were, in consequence, transferred to Albany. Fort Rupert was, subsequently, again abandoned; this time permanently. At Fort Nelson there was no attempt at any establishment of the English until 1682; the attempt was an abortive one, the Company's servants and goods being seized by the French, who had been in prior possession. See appendix B, hereto.

*At the time of the Treaty of Utrecht they had a *de facto* possession of only one spot on the shore of the Bay, and that illegally, and it is shewn by themselves, (see *ante*, p. 391, note §) how precarious and barren the possession. After the Treaty of Utrecht, they confined themselves, as they frankly admit (note †, p. 284 *ante*) to certain spots on the shore, not only during the French occupation of Canada, but also for a long period thereafter. Then, it was claimed by Ontario, that the acquisitions of the Crown under the Treaties of 1713 and 1763 could not, in the circumstances, enure to the benefit of the Company, (*ante*, p. 190, note †); and, further, that a commission was greatly more far-reaching in its effect than is suggested by counsel (*ante*, pp. 378, note ‡, 380, note §). But granting, for argument's sake only, that the company were properly in possession of any place on the coast under their charter, and not merely in the enjoyment of a right in common with the other subjects of the Crown, counsel has not shewn in evidence that the lines of the Award would embrace any place so actually occupied. Henley was on the north bank of the Albany; Fort Albany was on an island in the estuary; Fort Moose also on an island, on the Bay, at the mouth of the Moose.

†The Lord Chancellor had already remarked upon this contention: "It is not a question of taking away, it is a question of evidence as to the *status quo* of rights," etc.

held to be precisely what they say—are to be held all of them to be intentional—if Lord Durham's commission, at page 405, is to restrict our boundaries on one side because it is to be presumed that the change of phraseology in it was intentional,* and because it is to be said as a proposition of law that it can have that effect, then what is the meaning of restricting the other boundary and only going into Lake Superior.†

The LORD CHANCELLOR.—The other commissions are the same?

Mr. ROBINSON.—From 1838 to 1846 they run in the same terms.

The LORD CHANCELLOR.—Then there is no more recent boundary commission?

Mr. ROBINSON.—No. After that they give no boundaries. They simply describe the province and give no boundaries.

The LORD CHANCELLOR.—And during all this time, there was no controversy at all about the boundaries between Rupert's Land and Canada?

Mr. ROBINSON.—Up to 1846, I do not remember that there was.

Lord ABERDARE.—Was the country east of James' Bay described as Rupert's Land?

Mr. ROBINSON.—That, my Lord, I cannot give your Lordships information upon. My learned friend refers me to a map which comes from the Hudson's Bay Company, and which shews that in 1838 this country practically was covered by the forts of the Hudson's Bay Company.‡

The LORD CHANCELLOR.—You will observe that in the British North America Act, 1867, these words occur, in the 6th paragraph:

"The parts of the Province of Canada, (as it exists at the passing of this Act,) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada, shall be deemed to be severed, and shall form two separate provinces."

Then are not these commissions some little evidence as to what the provinces existing at the time of the passing of the Act were?

Mr. ROBINSON.—Then if so, if we are to be bound by the commissions to Lord Durham, all we can say is they do not carry Ontario beyond Lake Superior. Lord Durham's commission is to go into Lake Superior.§

The LORD CHANCELLOR.—You may say it ends there.

Mr. ROBINSON.—It does not go farther.

The LORD CHANCELLOR.—It does not limit the boundary further, but it is perfectly consistent with the continuation along the boundary—the American line.

Mr. ROBINSON.—Yes; it does not go further.

The LORD CHANCELLOR.—It does not limit the boundary further, but it is perfectly consistent with the continuation of the boundary along the American line.

Mr. ROBINSON.—Yes.

LORD ABERDARE.—And if it goes as far as Duluth‖ it would give to us a great deal of the awarded territory.

*Ontario claimed, and their Lordships had already favoured the view, that the two phrases, "boundary line of Hudson's Bay," and "shore of Hudson's Bay," were here to be taken to be synonymous, and the latter phrase as explanatory of the first.

†This was because of the international boundary commissioners under the Treaty of Ghent having agreed upon a line in that quarter drawn to a certain point in Lake Superior only, and disagreed upon the course of the line from that point to a point at the foot of Rainy Lake (*ante*, p. 308, note §.)

‡The forts referred to were chiefly those of the North-West Company of Montreal. See list of them, as of 1821, *ante*, p. 292, note *. The two companies amalgamated this year.

§The explanation is given *supra*, note †; and besides, there is in the commission no attempt to enclose or restrict the province on the west by a line drawn northward from Lake Superior, or by any line whatsoever; whereas on the east the line is drawn by metes and bounds to the shore of the Bay.

‖The map prepared by Ontario for their Lordships shewed Duluth, at the head of Lake Superior.

Mr. ROBINSON.—Yes. Our belief has always been that those commissions really were not drawn with any view of accurately limiting or binding the provinces, or of describing any fixed boundaries which had been fixed by Statute before, but were drawn simply to define the authority of the Governor over particular territory. They could be renewed or changed from time to time, and they were never intended to have the force given to them here.*

Lord ABERDARE.—Is not a reasonable view of the question this: that they were sufficiently specific in describing the boundaries between Upper and Lower Canada, but that they were not competent to go into the question of the western boundary.

Mr. ROBINSON.—I think one may say that, and I also say generally that these commissions were drawn for a totally different purpose.

The LORD PRESIDENT.—But the earlier commissions did that and treat themselves of doing it—in the years 1774 and 1786.

Mr. ROBINSON.—They would not trouble themselves about the western boundary after that. They were simply drawn under the Statute dividing the provinces—and so long as they preserved the boundary it did not matter. The original boundaries on each side were fixed by the Quebec Act, and they were never intended to interfere with them. That has been the view at all events we have taken of the different commissions.† We say that that commission, by going to the shores of Hudson's Bay, practically took away a large portion of what we believe to have been granted to the Hudson's Bay Company‡—a claim which has been recognized by the. crown.§ Then we say we have an equal right to insist on the fact that that commission does not take them to the west end of Lake Superior—that all it does is to take the boundary into Lake Superior.‖

The LORD CHANCELLOR.—I suppose no one controverts the fact that the northern shore of Lake Superior, up to the territory now in controversy, belongs to Upper Canada.

Mr. ROBINSON.—I do not know that they do.

The LORD CHANCELLOR.—There is all the difference in the world between controverting an uncontrovertible state of facts, and one which is in controversy. If you were fighting and contending for that boundary of Upper Canada which is bounded by Lake Superior, then the words "and thence into Lake Superior" would be worth attention; but you are not, and there is no room for any such controversy. I cannot perceive the bearing of the argument. If the words as to the north line were equally indefinite, then I could well understand that you would be very fairly entitled to say it is inconsistent with its being or not being a prolongation. But they are perfectly different—"until it strikes the shore of Hudson's Bay."

*As already pointed out, the Commissions were solemn Acts of State, under the Great Seal, and adopted by Orders in Council; and their issue surrounded with great formalities. *Ante*, p. 365, note *.

†The position of Ontario, already set forth, was, either that the enlarged Province of Quebec under the Act of 1774 was co-extensive with the Canada of the French ceded by the Treaty of 1763; or if not, then that it was enlarged to that extent under the Orders in Council, and by virtue of the Act, of 1791; that even if it were true that the Crown could not diminish the territorial extent given to a province by Act of Parliament, it was quite within its competence, in the exercise of its prerogative, to enlarge the boundaries of such province.

‡See *ante*, p. 392, note *.

§See *ante*, p. 391, note *. Moreover the Crown might, as against France, put forward in support of its case such possessory rights or legal claims as might be attributed to the Company, and yet not feel constrained, in the circumstances, to a recognition of a like claim by the Company as against the Crown.

‖ The cases are not at all parallel, and the equal right does not follow. See *ante*, p. 393, notes † and §.

Mr. ROBINSON.—Then, is it not a reasonable argument to suppose that that was never intended to change the boundaries or the limit of the Hudson's Bay charter ?

The LORD CHANCELLOR.—But the question is whether it is evidence of what that boundary was; not under the charter—because the charter was not a boundary charter at all—but under the rights which have resulted from possession.

Mr. ROBINSON.—Then, if it was uncontroverted that that portion north of Lake Superior belonged to Canada by virtue of occupation, it was equally uncontroverted that the land where they went to the shores of Hudson's Bay belonged to the Hudson's Bay Company by occupation.*

The LORD CHANCELLOR.—What evidence of possession since 1791 of anything within that time, have you produced—that is possession by the Hudson's Bay Company since 1791 ?

Mr. ROBINSON.—If I understand rightly, they had the Moose Fort there.

The LORD CHANCELLOR.—To have the possession of a fort we know is possible.

Mr. ROBINSON.—Surely, my Lords, the possession, under the circumstances of the country and company, of a fort on the shore, from which they traded into the upper country, was possession of the upper country in the only way in which they can take possession.†

The LORD CHANCELLOR.—If they had nothing but their forts, it is quite consistent that they should have those forts, though within Canada.

Mr ROBINSON.—Surely it is inconsistent, as I submit with confidence, with every view that has ever been taken of the rights of the Hudson's Bay Company in that country, that they were confined to the limits of the coast of that point.

The LORD CHANCELLOR.—We have to deal with nearly one hundred years of Acts of State carrying the boundary up to Hudson's Bay, if the earlier commission is to be construed in the same way as the later ones.

Mr. ROBINSON.—But we are now dealing with an Act or Commission of 1838.

The LORD CHANCELLOR.—Yes, but that follows on the earlier commission of 1791.

Mr. ROBINSON.—But the commission of 1774, if I recollect rightly,—

The LORD CHANCELLOR.—The provinces were not divided then.

Mr. ROBINSON.—No, my Lord; they were not divided at that time.

The LORD CHANCELLOR.—It is only when the provinces came to be divided that this boundary comes into existence and becomes important.

Mr. ROBINSON.—Well, my Lord, our contention has always been that there was no change made in the Province of Quebec by the commission of 1791. There could be no change made in it by any commission ‡ It either was settled or not settled by the Act of 1774.§ The subsequent commissions ‖ contain no limitations of boundaries, and therefore they cannot assist us.

Now, your Lordships will understand the argument which I have addressed to you, and which I have endeavoured to put just in those two points. We first contend for the due north line, and we have pointed out to your Lordships the authorities on which we argue for that. We next contend that at all events we

* See *supra*, p. 392, note *.

† But the upper country was in the adverse possession of France, and the Hudson's Bay Company never had possession whatsoever of any part of it (except Henley) until long after the close of the French occupation of Canada, and then only in common with the other subjects of the Crown.

‡ See as to this *ante*, pp. 378, note ‡, 387, note *, 388, note §. The instruments of authority in 1791 were, besides the commission, the Orders in Council, Proclamation and Act of Parliament.

§ *Ibid.* And see *ante*, p. 394, note †.

‖ That is, the commissions subsequent to Lord Elgin's, of 1846.

go to the southern limits of the Hudson's Bay territory—I mean of the territory granted; that that territory is defined by the terms of the grant, and by the construction which should be put upon that grant at the time it was given, at all events coupled with the acts of occupation which followed it, which are questions of fact.* We say that beyond all doubt or question, founded on our own assertion, or our own assertion confirmed by the Crown, our limits long after that were limits only confined by the watershed. We say that that being the case, it was impossible to take away from us territory which we had thus acquired by our occupation.* We had not occupied as individuals, because a distinction must always be drawn between an occupation by individuals, which may give individuals proprietary rights, and occupation by a country, which gives international rights. Of course, we have always conceded that the French subjects living on our territory may acquire such rights as individuals can acquire by prescription or by occupation; but what we have always denied is that the French rights, and the French occupation, ended as it was by the cession, in 1763, can have any effect upon our grant as between us and the Province of Ontario—we both claiming under the same power, namely, the Crown of England, and the legislature of England. Whatever rights the French might or could have asserted they have lost by the cession, and they are out of the way. The whole question now is between British subjects, and between parties claiming under the Crown of England.†

Then my Lords, we say with regard to these commissions they are inconsistent one with the other.‡ They are not intended for the purpose and were not drawn with the object of defining the limits of the territory as a matter of boundary. They were simply drawn with the intention of giving authority to the governors, so that it would be within the limits of executive authority, as I understand the law, and as laid down in Penn *v.* Lord Baltimore, whatever might be the legal boundaries of the province, to give to the governor of it, by his commission, more extended jurisdiction. In other words, the Crown can give to the governor of any territory, the limits of which are fixed by statute, a jurisdiction over an additional territory, and we say that at most these commissions could have no other effect.§

Then my Lords I only wish to add a few words with reference to this Award, with reference to the position of the Dominion with reference to the Award, and with reference to the whole subject generally. With regard to this Award, we do not know precisely what was the intention of the reference to arbitration—whether it was intended as a reference, or whether it was accepted, or acted upon,

* It has been already abundantly shewn that of no part of the interior was there any occupation by or on behalf of this company; that on the contrary it was in the adverse possession of France; that the so-called occupation of the shore was, up to 1713, temporary and precarious, and of certain isolated spots only, from which the French ousted them as trespassers; that the benefits of the Treaties of 1713 and 1763 enured, under the circumstances, not to the company but to the Crown, and the Crown could, and did, deal with the territories according to its discretion, the company being left on an equal footing with the other subjects. *Ante*, p. 190, note †; appendix B, hereto.

† All this has been already answered by Ontario; and see *ante*, p. 190, note †.

‡ This has not been shewn; on the contrary, Ontario claimed and shewed that they were in harmony, any apparent differences being explainable.

§ Ontario had already shewn that these commissions, instead of having the limited effect contended for here, were in fact orders of the Sovereign in Council, and passed under the Great Seal, and were the subject of other formalities—the whole constituting them very solemn and authoritative acts of State, competent to accomplish all that Ontario claimed for them. The commissions, in terms purported to describe the boundaries of the province, and not of any outside territories. Chief Justice Smith, of Quebec, in a communication to Governor Lord Dorchester, in 1790, discussing the proposed boundaries of Upper and Lower Canada, says:—"All this is upon the supposition that it is necessary to parcel out His Majesty's dominions by Act of Parliament. If not, then Mr. Grenville's first clause for the repeal will stand unaltered, and the two provinces take such limits as the Royal Commissions to their Governors shall assign." (Joint App. 391.)

as a reference, to settle the true legal boundaries, or was a reference to ascertain what would be the most convenient and best boundaries.* There is no doubt about one thing, that the Act which Ontario passed after the Award, by which it was enacted that the boundaries given by the arbitrators shall be the boundaries whether they alter or diminish or change the true boundary or not, is the strongest intimation on the part of that province of the light in which they regarded the arbitration, namely, that they regarded the Award as being conclusive whether it fixed the true boundaries or not.† Now the Government of the day—the Dominion Government and the Parliament of the day—have always said that that never was intended to be the reference, and if it ever was intended to be the reference, it never was an authorized reference, and never should have been made, for there never was any authority to make it on the part of the executive.‡

The Lord Chancellor.—What is the use of any arbitration except to settle the disputed points?

Mr. Robinson.—Yes; but a very great question is, on what principle you are to settle the disputable points.

* The suggestion that the reference on the part of either the Dominion or Ontario was with any other object than the ascertainment of the *true* boundaries is not supported by any evidence—is in fact emphatically disproved by the evidence. The question submitted is referred to in the Orders in Council of Ontario thus: in that of 1874: "The question concerning the northern and western boundaries of the Province of Ontario should be determined," etc.; and in that of 1878: "The matter of the northerly and westerly boundaries of the Province of Ontario in relation to the rest of the Dominion"; and in the Orders in Council of the Dominion, thus: in that of 1874: "To determine the northern and western boundaries of that province relatively to the rest of the Dominion"; and in that of 1878: "The northern and western boundaries of the Province of Ontario." The Lieutenant-Governor of Ontario, in his Speech at the opening of the Legislature on 12th November, 1874, said on this subject: "My Government and the Government of the Dominion have agreed on a provisional line, to be assumed as correct for the purpose of land grants by each Government, until the true and permanent boundary shall be ascertained and determined; and have agreed to leave to arbitration the question of the permanent boundary." The other official documents or utterances on the subject all point in the same direction: they make use of the expressions "*the* boundaries," and "*the true* boundaries" as being synonymous, *many* of them referring in the same paragraph or sentence, to the "provisional" or "conventional" boundaries agreed upon for temporary purposes.

† By their Orders in Council referred to in note [1] *supra*, the Dominion and Ontario respectively agree "that the determination of a majority of such three referees be final and conclusive upon the limits to be taken as and for such boundaries," and also "agree to concurrent action in obtaining such legislation as may be necessary for giving binding effect to the conclusions arrived at, and for establishing the northern and western limits of the Province of Ontario in accordance therewith." Both parties then considered that legislation would be necessary to give legal effect to the conclusions of the Award, whatever they might turn out to be, and the question arose how this could best and effectually be done. A direct Act of the Imperial Parliament would, in the ordinary course of things, have been required, but the Government of Ontario came to the conclusion that the enabling Imperial Act, 34 and 35 Vict. cap. 28, already on the Statute Book, placed sufficient authority in the Provincial and Dominion legislatures for the purpose in view here: "The Parliament of Canada may, from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish or otherwise alter the limits of such province," etc. The Ontario Act, 42 V. c. 2, adopts the same language: "Whereas it was agreed . . . . that the true boundaries should be determined by reference to arbitration . . . . and whereas the effect of the said award is to give to this province less territory than had been claimed on behalf of the Province, and more territory than the Government of Canada had contended to be within the limits of the province . . . . The Legislature of the Province of Ontario consents that the Parliament of Canada may declare that the boundaries which by the Award of the arbitrators aforesaid were decided to be the northerly and westerly boundaries respectively of this province, shall be and are the northerly and westerly boundaries thereof, whether the same increase, diminish, or otherwise alter the true northerly or westerly limits of the province" The Dominion Government failed to abide by its solemn engagements as to concurrent legislation, and the outcome was the present reference of the question, in so far as it affected Manitoba, to the Privy Council. [Writing at this late date, it may not be out of place to draw attention to the irony involved in the adoption of the lines of the Award by the Privy Council in regard to the Manitoba section, and by the Government and Parliament of Canada in regard to the rest of the awarded boundaries, and the confirmation of the whole by Act of the Imperial Parliament on the prayer and address of the same Parliament of Canada.]

‡ Notes * and † *supra*, shew that the question referred was that of the true boundary. And as to legislation being required to give binding effect to the decision of the three arbitrators, how much more would it have been required had the proposal of "the Dominion Government of the day" that some "distinguished [English] legal functionary should be invited to come to Canada, to sit in Toronto or elsewhere, for the purpose of hearing the evidence and deciding upon the boundary question," been acceded to? (The Secretary of State (Canada) to the Lieutenant-Governor of Ontario, Sess. Paps. Ont. 1882, No. 23.)

The Lord Chancellor.—Supposing the arbitrators did settle as well as they could the true boundary, it is very difficult to say that the award is always to depend for its validity on the question of whether it is right or wrong; and when it concerns matters of this sort, surely it is a reasonable thing for a competent Legislative Authority to give it effect whether it is right or wrong.

Mr. Robinson.—Whether it may be a reasonable thing or not, one thing is certain, that it was utterly impossible for them [the Legislature of Ontario] to do it.

The Lord Chancellor.—I am not going into the motive which led the Dominion to recede from its engagement. That is not our affair.

Mr. Robinson.—What I mean is, that that arbitration has been looked upon as an arbitration, not to settle the actual legal boundary according to legal rights, but an arbitration intended to give the arbitrators power (and so interpreted by the arbitrators), to settle what was, under all the circumstances, the best and most convenient boundary.*

The Lord Chancellor.—What we gathered from Sir Francis Hincks' document is this: that the arbitrators having settled certain points on the strictest principle, according to the best of their judgment, then the person who represented the Dominion said it would be convenient that those points should be connected by a good geographical boundary, and the arbitrators thought the Albany River line was proper for that purpose. Then, finding some indications in previous documents that that view of the Albany River line had been at one time entertained by the Hudson's Bay Company, it was adopted. I do not think it is for the Dominion, I must say, to complain of that. I do not mean that they are bound by it. Of course they are not; but inasmuch as it was at their instance that that amount of deviation, if it was a deviation, from the ascertainment of the exact line took place, they can only blame the agent who then represented them, who asked for it, [namely, Mr. J. Stoughton Dennis, Deputy Minister of the Interior].

Mr. Robinson.—However that may be, your Lordships will find that the whole question was referred to a Committee of the House of Commons.

Sir Montague Smith.—What are you now addressing us upon? We have held that the award was not binding.†

Mr. Robinson.—Then, the award not being binding, I am only desirous to call to your Lordships' attention just these considerations. The Dominion, as I have said, is not the direct litigant party here, claiming any territory. They are not very much concerned as to whether this territory belongs to Manitoba or Ontario. The only way in which it could be said they have any direct claim is that they have the management and the control of the Crown Lands in Manitoba, and they have not the management or control of the Crown Lands in Ontario. That is the only sense in which the Dominion have any interest in Manitoba differing from their interest in Ontario.‡

* It is pointed out, *ante*, p. 397, notes * and †, that the evidence emphatically disproves this suggestion of counsel.

† Because of the failure of the Dominion Government to abide by its agreement to procure confirmatory legislation. (*Ante*, p. 397, notes.)

‡ These statements scarcely represent the real situation. On the occasion of the arbitration, and before Manitoba was imported into the controversy, the Dominion represented all the interests antagonistic to those of Ontario, and the Award of the arbitrators was a finding on the whole case, and in respect of the whole territory, in favour of Ontario, and against the Dominion. Before the Privy Council, the same questions arose, the same class of evidence was adduced, and the same principles exactly were involved. These were to apply, as between Ontario and Manitoba, to that portion of the disputed territory in which alone Manitoba was interested, but the decision of the Privy Council, whatever it might chance to be, as to that portion, would also inevitably govern their decision, whenever it might be invoked, in regard to the larger por-

Your Lordships will also find that before Manitoba's boundary was extended, and before Manitoba had any interest in this matter, the Dominion asserted the view for which they now contend on public grounds, and the Dominion asserted that there never would be satisfaction felt by the people of the Dominion with any decision of this boundary except by the tribunal before which we now appear.* Now, as I have said, it is of little importance to us who owns these lands, but this is of great importance to us. It is necessary that we should endeavour to hold an even hand as between the different provinces. Your Lordships are perfectly aware that Confederation was formed under a great deal of difficulty, and it is carried on under some difficulty. Your Lordships are aware that old Canada contained one province which is to a very large extent subject to different laws, peopled by people of a different nationality, and of a different religion from the other province, and the great difficulty has from the commencement of Confederation been, not to say the jealousy, but the difficulty of reconciling the rights to which they are entitled with other matters. Now, all that I desire urgently to press upon your Lordships is this: that, whatever may have been the question before the arbitrators, there is no doubt whatever as to the question which we come before this tribunal to have decided. It is not to ascertain what is or is not a good or convenient boundary. I have nothing to say affecting any view which may be asserted, that the Albany River or the English River, and so on, is pointed out by geography and by nature as a good boundary, and that it is a convenient boundary. We cannot satisfy Manitoba by saying to her: You may lose a certain portion of land which you require, but it is very convenient that Ontario should have it. Still less can we satisfy Quebec, and this is a more important question—that province is the province of which I have spoken—by saying to her: The boundary as settled enlarges Ontario beyond what you imagined her to be, and beyond what you supposed her boundaries to be when you entered into Confederation; but it is a convenient boundary.† It is for that reason that I called attention specifically to this point, and called attention very strongly and specifically to the decision in the De Reinhard case. The Province of Quebec—and this is an assertion we have heard over and over again—entered into Confederation upon the agreement specified in the British North America Act, that Ontario should consist of what was formerly Upper Canada. They had a decision in their country by their highest courts, acquiesced in for fifty years, stating what was the line of division and what were the limits of Ontario. Ontario is what Upper Canada was. They had that decision,

tion of the disputed territory, in which the Dominion alone, with Ontario, now remained interested. The Dominion had therefore—aside from any question of party, or of politics—a very direct material interest, pertinent to itself, in the present case, and in the success of Manitoba and the failure of Ontario. The strenuous advocacy of Manitoba's case, as against that of Ontario, on the present argument by the counsel for the Dominion, is therefore not surprising.

* Yet, in the same year in which the Dominion Act for the extension of the boundaries of Manitoba was passed, the Dominion Government proposed that the question should be left to the decision of some one distinguished "legal functionary!" See *ante*, p. 397, note ‡.

† But the boundary of "convenience" to which exception has been taken by counsel throughout, was that of the line of the English and Albany Rivers; it was demonstrated by Ontario that given the most north-western point of the Lake of the Woods as the point of departure, the Award had, out of the lines available for connecting it with the shore of Hudson's Bay, adopted the one most favourable to the Dominion and to Manitoba, and that therefore neither the one nor the other had any valid ground of complaint on this score (see *ante*, p. 335, note *); nor could Quebec have, for it is to be remembered—what counsel appears to have overlooked—that the acts of authority which carried the limits of Ontario to the shore of Hudson's Bay, carried to the same shore the limits of Quebec, and established her title to an immense tract of territory to the north of the height of land to which her limits had been popularly supposed to be restricted: "And which said Province of Lower Canada is also bounded by a line drawn due north from the head of the said lake [Temiscaming] until it strikes the shore of Hudson's Bay." (Commissions to the Earl of Durham, Sir John Colborne and Charles Poulett Thomson, respectively, as Governors-in-Chief of Lower Canada. Joint App. 405-6.)

and for that reason I called it to your Lordships' attention, and endeavoured to do so very plainly; a decision which had stood unquestioned for fifty years, specifying what were the limits of Ontario. Upon that understanding, existing in their minds, they entered Confederation.

The LORD CHANCELLOR.—Is it possible to seriously represent that they entered Confederation on the faith of the De Reinhard judgment?

Mr. ROBINSON.—No; not on the faith of the De Reinhard judgment. I say it was on the faith of the definition of the British North America Act that Ontario should be what Upper Canada had been. I simply point to your Lordships' attention, that there was in Lower Canada at that time a decision, recognized for fifty years, which had decided the limits of Upper Canada, and which therefore may be held to be the law of Canada.

The LORD CHANCELLOR.—What do you mean by recognized for fifty years?

Mr. ROBINSON.—I mean never questioned.

The LORD CHANCELLOR.—How could it be?

Mr. ROBINSON.—There was the decision at all events, and it had never been judicially questioned.

The LORD CHANCELLOR.—A man was convicted of murder and was afterward pardoned, as I understand. That is the long and short of it.

Sir MONTAGUE SMITH.—Quebec must have been perfectly aware of these Commissions, [viz., the commissions to the Governors, naming the most north-western point of the Lake of the Woods, on the west, and the commissions carrying the eastern boundary to the shore of Hudson's Bay.]

Mr. ROBINSON.—I suppose so.

Sir MONTAGUE SMITH.—You are now taking a popular view of it, and these commissions are much stronger than the popular view to shew where the boundary of Upper Canada was.

Sir BARNES PEACOCK.—Did not that case decide that the place where the murder was committed was beyond the western boundary of Canada?

Mr. ROBINSON.—Yes.

The LORD CHANCELLOR.—I thought that was the opinion of the judge, and the grounds on which it was decided. They distinctly adopted the due north line from the confluence of the rivers.

Mr. ROBINSON.—Yes.

The LORD CHANCELLOR.—All that was done was to convict a man of murder, who was afterwards pardoned, and there was no possibility of raising the question, in any way, whether the decision was right or wrong.

Mr. ROBINSON.—I am only stating that there was a decision, known and supposed to be right.* All I desire to press on your Lordships, that there may be no misunderstanding on that point, is simply this, that what we desire to have settled is not what is a convenient or satisfactory boundary, but what is the true legal boundary, according to the construction of the statutes. That, we conceived, we were bound to obtain for the different provinces. When we have obtained that, we have not the slightest doubt they will all cheerfully submit to

* Ontario claimed that the facts as now known, not only did not justify the contentions of counsel in regard to this decision, but that on the contrary they stripped the decision of any force whatever as a factor in favour of the Dominion contention. For the purposes of the trial, the court felt impelled to declare the boundary, and in doing so construed the term "northward" in the Quebec Act as meaning due north; but, this done, they expressly reserved the question of the true boundary, and therewith the question of jurisdiction, over "to the King and his council, and in deciding the limits of Upper Canada they will either confirm or reverse our decision. . . As to any consequences that may result from our error, if error we have committed, they will be obviated by the supereminent authority to whom the question is referred." (From the Judgment of Chief Justice Sewell.) There was a respite from time to time, and the prisoner was ultimately set free. (See fuller particulars, *ante*, p. 341, note.)

whatever the decision of this tribunal may be, but it is to get that, and that single question alone, decided, that I am here, before the highest tribunal in the Empire, so that it may be settled on what we believe to be its proper basis, and upon the basis which the provinces assert to be their right, and that they may have the right which we believe, as representing the Dominion, it is our duty to obtain for them.*

The LORD CHANCELLOR.—Will you allow me to ask you one question. Supposing in any part of the boundary there should be any uncertainty, do you mean to say that we are not to exercise that kind of judgment which a jury would do, and come to the best conclusion we can upon the materials?

Mr. ROBINSON.—It is not for me for a moment to say what your Lordships would do.

The LORD CHANCELLOR.—Is it your proposition, that unless we find the boundary to be demonstratively proved in any given point, we are not desired to come to any conclusion?

Mr. ROBINSON.—That proposition has never presented itself to my mind, because it has never occurred to me that it would be your Lordships' conclusion that it was impossible to say what the legal boundaries were.

The LORD CHANCELLOR.—We can easily make certain approaches to it undoubtedly, but it may well be that it may be impossible for us to be confident by demonstrative evidence, that the line which you assert, or your opponents assert, or which anybody else could lay down, is correct on all points. We may, at certain points, clearly ascertain it. Assume, for the moment, that the south-west boundary is clearly ascertained, and assume for the moment that the north-east boundary is clearly ascertained—then the intermediate boundary may perhaps not be so clearly ascertained. Are we to do nothing?

Mr. ROBINSON.—It is not for me to say.

The LORD CHANCELLOR.—You did just now submit, with what I thought some degree of earnestness, that we were only to find the true boundary, and were not to exercise any power of arbitration or anything like that, if in any respect there would be a difficulty in ascertaining the true boundary.

Mr. ROBINSON.—I do not see that I can say more than this, that the different provinces assert that there are true legal boundaries fixed.

Sir MONTAGUE SMITH.—By referring it to arbitration you presume that the boundary cannot be shewn to demonstration. If it was apparent that it could be, the courts of law might have decided it.

Mr. ROBINSON.—I do not know that.

The LORD CHANCELLOR.—We may be quite satisfied that the direct north line from the confluence [of the Ohio and Mississippi] is not right; we may be satisfied that the watershed line is not right; we may be quite satisfied that the 49th degree is not right; we may be satisfied that at certain points we have found the true boundary. As to its being found by demonstrative evidence along the whole northern course, that may be perhaps a difficult conclusion to arrive at. Do you say we are to do nothing as to any part of the boundary concerning which we have not direct and demonstrative evidence?

Mr. ROBINSON.—The reference is, and was so intended to be, to ascertain what are the true boundaries.

The LORD CHANCELLOR.—I am assuming this state of things, that we can, to some extent, ascertain to the satisfaction of our own minds, certain points in the true boundaries beyond doubt, and that there are other points as to which the

* As to all this, see the Lord Chancellor's remarks, *ante*, pp. 397-8, and the notes, pp. 397, * and †, 399,†.

evidence is much less conclusive, and I wanted to know what your proposition is as to the position we had to discharge. I suppose a jury would do the best they could under such circumstances. Are we to do the same?

Mr. ROBINSON.—I should have thought not, my Lords, because I never thought we were coming before your Lordships as a jury.

The LORD CHANCELLOR.—We might have been saved all this argument if that is your contention. What is the use of referring to this tribunal such a question as this if we are to do nothing, unless the evidence is demonstrative?

Mr. ROBINSON.—In other words, we are not to judge of the amount of proof which your Lordships require, the question submitted being, what is the true boundary. What I am asked is what your Lordships are to do if you find no true boundary.

The LORD CHANCELLOR.—We know there must be some true boundary. It may be that the evidence as to a certain part of the lines to be drawn may be very far from complete or satisfactory. Supposing for instance we had ascertained those two points, [viz., the south-western and north-eastern points,] do you say we ought to draw an arbitrary line—a direct line—between them?

Mr. ROBINSON.—No, my Lord, I do not, nor am I able at this moment to say to your Lordships, nor would I presume to say, what course your Lordships should take. I only desire to avoid any impression that we were submitting the same question here which had been believed by the arbitrators to be submitted.* That is all I desire to guard myself against, because I know that the provinces desire their boundaries to be ascertained.

Lord ABERDARE.—Supposing we should be of opinion that there is no evidence to shew the true boundary, would you have us so find?

Mr. ROBINSON.—I should suppose so. That would be my impression on the reference. It is a question I have never considered for a moment.

Sir MONTAGUE SMITH.—It must be done on presumptions. If evidence fails, it must be the best presumptions we can make upon the facts before us.

Mr. ROBINSON.—I hope your Lordships understand this, that we can make no objection to your Lordships entertaining any presumption of any legal boundary.

Sir MONTAGUE SMITH.—Or on any question of fact either.

Mr. ROBINSON.—I wish there to be no misunderstanding about that.

Sir MONTAGUE SMITH.—It is a mixed question of law and fact.

Mr. ROBINSON.—And your Lordships would so treat it.

Sir MONTAGUE SMITH.—If boundaries were described by language in the deeds, then we must construe the language, but when it is by reference to a grant, then that grant has itself to be construed by what was done under it.

Mr. ROBINSON.—Then, I think I understand your Lordships better. It is a question of mixed law and fact. If it be so, we wish your Lordships to decide those questions of law and fact, because the question of what the true legal boundary is, involves both those questions, and we wish that decided; but we do not wish it decided on any view of conventionalism or convenience.

Sir MONTAGUE SMITH.—*Mere* convenience.

Mr. ROBINSON.—Yes. There is another question to which, without speaking upon it, I wish to draw your Lordships' attention. The question is, whether your Lordships' decision will require any Imperial legislation to carry it into effect. That will have to be considered, and that depends on whether the present

* The Arbitrators could not, in the face of the Orders of Reference, have believed, and did not believe, that the question submitted was any other than that of ascertaining the true boundary. See *ante*, p. 401, note.

legislation contained in the British North America Act, 1871,* is sufficient or not. The difficulty has been this, that that authorizes the provinces, with the consent of the Dominion, to alter, change, or diminish, and so on, all the boundaries. Now, we are not asking, and this reference is not to alter, change, or diminish, the boundaries, but to establish them, and if, in your Lordships' view, that should be the correct view of it, then it would require Imperial legislation, which of course would be obtained.

The LORD CHANCELLOR.—I suppose nothing but Imperial legislation would be satisfactory to either party, because it is manifest that if there is not Imperial legislation, the same thing would happen over again which happened in the case of the Award. The party who did not like the conclusion would come and say he was not bound by it.

Mr. ROBINSON.—I do not think there is the slightest apprehension of that.

The LORD CHANCELLOR.—I do not express apprehension. I suppose nobody had apprehension before, when they assented to the Award.

Mr. ROBINSON.—The question is whether that legislation is required, and I only desire to point it out to your Lordships that there is that to be settled.

Sir BARNES PEACOCK.—You say under the Act [of 1871] there is no power to settle the boundaries but only to alter them.

Mr. ROBINSON.—Yes, it is supposed that they knew the boundaries and they may change or diminish them.

Sir MONTAGUE SMITH.—They may add to them.

Mr. ROBINSON.—Yes, but they must know what they are adding to.

[*Adjourned for a short time.*]

The LORD CHANCELLOR [*to Mr. Mowat*].—Their Lordships are of opinion that you may assume the southern boundary, and the western to a point north of the Lake of the Woods (I do not at present say what is the exact point) to be sufficiently established as correct as laid down by the Award; and their Lordships therefore wish you to address yourself to the question of what I may describe as the northern boundary of the disputed land, and the evidence by which you think that is made out.

Mr. ROBINSON.—Will your Lordships allow me to mention before my learned friend commences, that I promised to put in the statement of the Hudson's Bay Company as to the post and fort on the Red Lake. I find we are both mistaken my Lords. It is not where I thought it was, and it is not where my learned friend thought it was. It is stated here, [*handing a document to their Lordships*].

The LORD CHANCELLOR.—Is it in any place material to the present enquiry?

Mr. ROBINSON.—It is just on the north of the disputed territory.†

The LORD CHANCELLOR.—Then we need not trouble ourselves about that.

What their Lordships desire to be understood is this, that the southern boundary is in their opinion correctly laid down in the Award, and substantially the western, but at the same time it is not to be taken that the western boundary is so absolutely fixed to the north as to preclude the consideration of the northern termination of the western boundary in connection with the northern boundary. Do you understand?

*Imperial Act, 34 and 35 Vict., cap. 28.

†See *ante*, p. 238, note †. The question was as to the position of that Red Lake to which the Hudson's Bay Company had penetrated, and on which they had established a post, in 1790. Ontario claimed that it was far north, and beyond the awarded limits, but the other side, that it was south of the height of land and, on the maps, one of the sources of the Mississippi. It is here shewn that the latter view was erroneous.

Mr. MOWAT.—Yes, my Lord. Then I understand that I am not required to say anything with regard to the height of land?

The LORD CHANCELLOR.—No, nothing. Their Lordships do not adopt that view, nor do they adopt the 49th parallel.

Mr. MOWAT.—Nor with regard to the due north line from the confluence of the Ohio and the Mississippi?

The LORD CHANCELLOR.—Nor that.

Mr. MOWAT.—Then, it being established that we are entitled to a northern boundary somewhere north of the Lake of the Woods, the question is, what point north of the Lake of the Woods that westerly boundary should touch, what line should be our northerly boundary. There are some grounds on which to found an argument in favour of extending the westerly line, as in the case of the easterly, due north to the shore of the Bay, but being satisfied with the line of the Award, and favouring the natural water boundary, we do not press for the due north extension of the westerly line. And of this circumscription of our claim neither Manitoba nor the Dominion can in any way complain, as it leaves a larger territory at the disposal of one or the other of them.

Lord ABERDARE.—There is the line on Mitchell's map. What do you say to that?

Mr. MOWAT.—That line is an uncertain line. All that Mitchell's map in fact indicates is that the line is north of the Lake of the Woods, but it does not help to ascertain where. My learned friends have not suggested, and nobody can suggest, any possible line if you once pass the Lake of the Woods until you reach the English River. Something might be said for a more northerly boundary; and if I was claiming a more northerly boundary I think I might find something to say in favour of it; but since I do not claim anything more than that of the Award, every argument which I might be entitled to use in favour of a more northerly boundary is sufficient to make a case for the English River. I do not know that I can do anything more than make the single observation, and take the position, that having reachod a point north of the Lake of the Woods, and no other line being suggested except the English River, the English River should be adopted; that if Manitoba and the Dominion desire to limit us still further, the burden ought to be upon them to shew that we are not entitled to go so far. In one of the documents which I think have been read by your Lordships—one of the early documents emanating from the Hudson's Bay Company—they object to anything but a river boundary, and they speak of anything other than that as being impracticable.

The LORD CHANCELLOR.—Where is that?

Mr. MOWAT.—That is at page 563, my Lord—at the foot of the page.* That is in one of the communications in 1701. The last sentence is:

> "As to the Company's naming of rivers as boundaries, and not latitudes, the same is more certain and obvious both to the natives as well as Europeans, and the contrary impracticable."

And the immense advantage of a natural boundary must be obvious to every one.

The LORD CHANCELLOR.—That is in the year 1701, when they were beginning to accept the Albany River—the same line which we have in the Award.

Mr. MOWAT.—Yes, my Lord, the same year. That affords another ground; as not only is it a usual thing to adopt a natural boundary, and not only is it in accordance with settlements made between nations when questions of this kind

* Printed *ante*, pp. 206-207. And see *ante*, p. 335, note *.

have arisen between them, but we have here one of the parties, familiar with the country, declaring that any other line would be impracticable. That, I submit, is a sufficient reason for adopting that line.

Sir ROBERT COLLIER.—Who says that?

Mr. MOWAT.—The Hudson's Bay Company, through whom the present defendants are claiming. They say it is impracticable. The advantages of this line, over any other are really enormous. It is impossible to state them too highly. The cost, which I referred to in my opening, of running an astronomical line, would be very large and out of proportion to the value of the territory, and, when done, would be an extremely inconvenient line. Now, convenience is of course an important element of decision, when there is nothing else to go by. It is not to over-ride more important elements, but we have nothing else to go by here, and when I mention that, and refer to what I propose as being analogous to what is done in other cases, where the natural boundary is taken into account by the Courts in the absence of other controlling considerations, I think I have said on that point all that I have to say to your Lordships.

[*Counsel and parties retired for a time to permit their Lordships to deliberate. Upon their re-admission*:—]

The LORD CHANCELLOR.—Ccunsel are probably aware that the practice of their Lordships in references of this character has always been not to deliver a judgment, with reasons, but to make a report to Her Majesty, upon which Her Majesty will act, or not, as she may be advised; and that course will be followed upon the present occasion. Their Lordships see no reason why they should deviate from that, even if it were clear that it would be consistent with their duty to do so. It is right to mention to counsel, that their Lordships will not consider it to be their duty to say anything about any boundary except the boundary between the two provinces of Ontario and Manitoba.

Whatever is beyond that will not enter into the report which they will make to Her Majesty.

APPENDIX.

A.—Award of the Arbitrators.

[Note, as to the limitation of the Western Boundary to the line of the Lake of the Woods.]

B.—Deduction of the claims of the Hudson's Bay Company and the French and English Crowns respectively.

C.—Imperial Order in Council, 11th August, 1884.

D.—Joint Address of the Senate and Commons of Canada to Her Majesty, with the proceedings in Parliament thereon.

E,—Imperial Act, 52 and 53 Vict., chap. 28.

A.

AWARD OF THE ARBITRATORS.

To all to whom these presents shall come:

The undersigned, having been appointed by the Governments of Canada and Ontario as arbitrators to determine the northerly and westerly boundaries of the Province of Ontario, do hereby determine and decide the following are and shall be such boundaries; that is to say:—

Commencing at a point on the southern shore of Hudson Bay, commonly called James' Bay, where a line produced due north from the head of Lake Temiscaming would strike the said south shore; thence along the said south shore westerly to the mouth of the Albany River; thence up the middle of the said Albany River and of the lakes thereon, to the source of the said river at the head of Lake St. Joseph; thence, by the nearest line, to the easterly end of Lac Seul, being the head waters of the English River; thence westerly, through the middle of Lac Seul and the said English River, to a point where the same will be intersected by a true meridional line drawn northerly from the International Monument placed to mark the most north-westerly angle of the Lake of the Woods by the recent Boundary Commission; and thence due south, following the said meridional line, to the said International Monument; thence southerly and easterly, following upon the international boundary line between the British possessions and the United States of America, into Lake Superior.

But if a true meridional line drawn northerly from the said international boundary at the said most north-westerly angle of the Lake of the Woods shall be found to pass to the west of where the English River empties into the Winnipeg River, then, and in such case, the northerly boundary of Ontario shall continue down the middle of the said English River to where the same empties into the Winnipeg River, and shall continue thence, on a line drawn due west from the confluence of the said English River with the said Winnipeg River, until the same will intersect the meridian above described; and thence due south, following the said meridional line, to the said International Monument; thence southerly and easterly, following upon the international boundary line between the British possessions and the United States of America, into Lake Superior.*

Given under our hands, at Ottawa, in the Province of Ontario, this third day of August, eighteen hundred and seventy-eight.

ROBT. A. HARRISON,
EDWD. THORNTON,
F. HINCKS.

Signed and published in the presence of—

E. C. MONK,
THOMAS HODGINS.

* NOTE as to the limitation of the Western Boundary to the line of the Lake of the Woods]:—

The Rupert's Land Act, 1868, declares that the term "Rupert's Land" shall mean "all the lands held, or claimed to be held" by the Hudson's Bay Company—that is, Ontario contended, "all the lands *rightfully* held, or *rightfully* claimed to be held."

Among the lands which the Company so claimed to hold under their Charter, were the 100,000 square miles subsequently adjudged to have been, and to be, within the limits of Ontario.

The Company made the like claim to the Red River country, and in fact to the whole of the North-Western Territory, outside of the Arctic slope; but with no better foundation, as was demonstrated by the evidence in this case, which conclusively established that the North-West had been an integral part of French Canada, and as such had been ceded, as an inseparable parcel of the whole, to the British Crown, by the Treaty of 1763.

On this ground, and as being so within the scope of the various acts of the Crown and Parliament, of 1774, 1786 and 1791, the North-West was claimed by Ontario, before the Arbitrators, and before the Privy Council, as being within the true limits of the Province.

That this claim of Ontario was only in part allowed—in having the line of its westerly limit drawn at the Lake of the Woods, instead of at the sources of the Saskatchewan—may be assumed to have been due to considerations which had no reference whatsoever to any supposed rights of the Hudson's Bay Company.

On the part of the Arbitrators, we are authoritatively informed that they entertained doubts, and that "the only questions of doubt were decided in favour of the Dominion; both on the west and north, the doubts were whether Ontario should not have had more territory."

Throwing aside the suggestion of any unconscious, though natural, leaning to decide the case of doubt against what some might consider the impolicy of giving to any one Province the preponderating influence in the Confederation which could not but result from the assignment to it of so vast a territory—it does not appear difficult to come to a correct conclusion as to what these doubts really were. The Arbitrators cannot but have felt impelled, in strictness, to favour the adoption of the line of the westerly and northerly watershed of the Saskatchewan, which seemed to Ontario to be clearly pointed out by, among others, the following facts and pieces of evidence:—(*a*) the actual occupation of the whole by France, (*b*) the terms of the Quebec Act, 1774; which embraced as well the "several colonies and settlements of the subjects of France" as "all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line" described in the Act, and on the north by "the territories granted to the Merchants Adventurers of England trading to Hudson's Bay," (*c*) the Royal Commission of 1786, (*d*) the Order in Council and the Proclamation respectively, of 1791, approved in effect by the Act of the same year, which are clear evidence that Upper Canada embraced "all the territory to the westward and southward of the [interprovincial line and of the boundary line of Hudson's Bay] to the utmost extent of the country commonly called or known by the name of Canada"—that is, the Canada of the French, which extended as far at least as to the westerly and northerly watershed of the Saskatchewan, if not to Athabasca. It had seemed to Ontario that these authorities—not in any wise qualified on a true construction of the other pieces of evidence relating to the subject—indicated with sufficient and undoubted clearness the territorial rights of the Province.

But, on the other hand, it may well have been that the Arbitrators felt constrained to a more restricted view of the scope of the Quebec Act by reason of the changed knowledge of the true geographical relations of the Mississippi and the Lake of the Woods; the drawing of the line of boundary of that Act "northward" from the source of the real, and not of the supposed Mississippi; and the extension of the southerly line, by the Treaty of 1783, and by the subsequent instruments, in terms as far only as "the most north-western point of the Lake of the Woods, and from thence on a due west course to the River Mississippi," when in reality the river was to be found, not on a due west, but on a due south course; and further, may have considered that the erection, in 1870, of the original Province of Manitoba, without protest on the part of Ontario, and its confirmation by Imperial Act, in 1871, operated by way of estoppel to Ontario's claim to a more westward extension.

And on the part of the Judicial Committee—having satisfied themselves that the extent of territory awarded to Ontario had been, *as far as it went*, determined upon the strictest principles of law, and not entering upon the consideration of any arguments in favour of the wider claim, except in so far as these went to strenghten the case in favour of the more restricted limits—an evident determination from the first to uphold, as against the one party and the other, the conclusions arrived at by the Arbitrators and embodied in their Award. The ready appreciation by the Attorney-General of Ontario of this fact, and of the masterful position in which a ready conformation to it on the argument would place the case of the Province, led to the determination—acquiesced in by all the associate counsel—to limit Ontario's claim to the lines of the Award, and to marshal in support the whole weight of the evidence which had been designed to fortify as well the narrower as the wider claim. The wisdom of this course was justified by the result. The Award itself—the mere instrument by which the Arbitrators made known their determination—could not be held to be legally valid, because of the breach of faith of the Dominion Government in failing to carry out their agreement to procure confimatory legislation; but the conclusions of the Award were fully upheld and re-affirmed. The Lords of the Judicial Committee of the Privy Council reported to Her Majesty:

"1. . . . That as no such legislation has taken place, the Award is not binding.

"2. That nevertheless, their Lordships find so much of the boundary lines laid down by that Award as relate to the territory now in dispute between the Province of Ontario and the Province of Manitoba to be substantially correct, and in accordance with the conclusions which their Lordships have drawn from the evidence laid before them."

B.

The numerous references, by the counsel for Manitoba and for the Dominion, to the respective rights and positions of the French and of the Hudson's Bay Company, in regard to the territory to the northward and westward of the watershed of the St. Lawrence system, which the counsel for Ontario, by the course pre-determined upon for the conduct of the argument in reply, were precluded from noticing in detail, seemed to call, in this edition, for some notes of correction or explanation in the interest of the general reader, who had not the advantage of access to, or familiarity with, the very voluminous evidence. It was found, however, that the frequent repetition of the same arguments, in varieties of form, would also involve considerable repetition in the foot notes; to avoid which, to some extent, the present Note also has been prepared, exhibiting a general view of the position of each party upon the evidence and the facts.

The figures printed at the end of each particular have reference to the pages of the Joint Appendix, except where otherwise specifically indicated.

I.

PROCEEDINGS OF THE FRENCH, OR BEARING UPON THEIR *REGIME*.

(1) As respects Hudson's Bay, and the Territories to the North of the Height of Land, up to the Treaty of Utrecht, 1713.

1608—City of Quebec founded (172).

1610—Formal act of taking possession of the country by Champlain (462-3).

1612—Commission to Champlain (647).

1627—Charter to the Company of New France, or of the Hundred Associates, covering Hudson's Bay and the territories northward to the Arctic circle (174, 197, 647), replacing a like charter of 1620 to the Montmorency (de Caën) Company. (*Ib.*; Ferland, i, 200.)

1632—Treaty of St. Germain en Laye, restoring Canada to the French, without limits (174, 197, 453). [Canada had fallen to the English, under Kirk, in 1629.]

1640—The Company of New France take possession of the region of New North Wales (463).

1656—The Company of New France, authorized by the Sovereign Council of Quebec, send Jean Bourdon to the Bay, in command of one of their ships—he takes possession and forms a settlement (466, 477, 625, 628).

1658—Decree of the Superior Council of Quebec, giving control of the King's Domain or Limits of (*Traite de*) Tadoussac to Sieur Demaure (653). [The said limits were adjudged to extend from the St. Lawrence, in front, back to Hudson's Bay "in the extent of whose boundaries are found the Posts of . . . . . Mistassins, and behind the Mistassins as far as the Hudson's Bay" (653, 656)]

1661—Fort Nemiscau, on the Nemiscau (Rupert) River, established (477).

1661—By order of the Governor, the Jesuit Father Dablon, with the Sieur de la Vallière, an officer, and five soldiers, proceed to the Height of Land, at the sources of the Rupert and Saguenay, and make acts of taking possession of the northern lands (467, 477, 625, 628).

1663—M. Couture, Seneschal of the Cote de Beaupré, accompanied by five others and some Indians of the country, proceed overland to the foot of James' Bay and take possession (467, 477, 625, 628).

1663—The Sieur Duquet, King's Attorney to the Prevôté of Quebec, and Jean L'Anglais, also visit the Bay, by order of the Governor, and take renewed possession (625).

1664—The Company of New France having surrendered their charter to the Crown, new charter granted to the Company of the West Indies, covering, like the former, Hudson's Bay and to the Arctic circle (467, 477).

1665—The possessions of France in America confirmed to her, as of this date, by the Treaty of Breda, 1667, (464-5, 512-13).

1662-6—Radisson and Des Grosselliers, employees of the Company of the West Indies, at Lake Winnipeg, being the upper waters of the Bourbon or Nelson river. They proceed thence overland to Hudson's Bay, returning the same way (463-4, 566).

1666—*Arrêt* of the King's Council of State, confirming the Company of the West Indies in their enjoyment of the Limits of Tadoussac, a former lease having been set aside (Book of Arbitration Documents, 203).

1667—Treaty of Breda—see 1665 *supra.*

1670—Charter to the Hudson's Bay Company, saving the possessions of "the subjects of any other Christian Prince or State" (341).

1670-1—The presence of English ships in the Bay being reported at Quebec, the Intendant Talon despatches Father Albanel, Jesuit, and the Sieur de St. Simon to the Bay, to examine into the matter and "to take renewed possession in His Majesty's name," "as those countries have been long ago (*anciennement*) originally discovered by the French" (619, 620).

1671—The Indian nations of the North and North-West, assembled before the sub-delegate St. Lusson, put themselves and the territories occupied by them under the French dominion (467, 478, 619, 628, 633).

1672—Claim of the Company of the West Indies, as against the French Crown, that the Limits of Tadoussac extend to Hudson's Bay (621).

1672—Formal taking possession of the lands of Hudson's Bay by Albanel and St. Simon. (Joint App., 478; Book of Arb. Doc., 348-9).

1673—Several forts and factories established by the French on the Hudson's Bay slope, viz., one on the Moose River (567), one on Pisgoutagany Lake (Lake Ste. Anne) on the Albany River, one on the Tabbitibi River, and one "between the Outoulibis and the Asseniboëls," which was probably towards the head of the Albany (478).

1675—A French-Canadian ship despatched to the Bay to check the designs of the English; it winters in the Bourbon (Nelson) River (638).

1676—French post established on the Bourbon (Nelson) River (626).

1679—Louis Joliet's voyage from Quebec to the Bay—his report and map, prepared at the instance of the Farmers of the Revenue (621).

1682—The French re-establish Fort Bourbon on the Nelson. The English arriving subsequently, and attempting a settlement, are, with their ships and effects, seized and kept prisoners (569, 572, 585, 622-3).

1683-5—The Hudson's Bay Company's servants refuse to visit the inland parts (585).

1683—Two detachments of French proceed towards Hudson's Bay, to protect the trade and oppose the English (623).

Ante 1684—Fort on the River Lamaune [? Savanne] established by Du L'Hut (624).

1684-5—Fort on Lake Ste. Anne (Albany River) re-established (624; see Bellin, 643).

1686—Chevalier de Troyes and D'Iberville, with a military force, march overland and capture three English forts on the Bay (570-1, 627).

1686—Fort Abbitibi built by De Troyes (Ontario, App. 7, 101).

1687—Treaty of Neutrality, confirming the treaty of Breda, and to each party the territories held by them (454-5).

1687—Indians accustomed to trade at Hudson's Bay, to the number of 1,500, trade at the French forts on "the rivers above the Lake of the Allenimipigons" [the branches of the Albany] (629).

1687-1697—During this period the posts on the margin of the Bay were in the hands of both parties alternately, Fort Albany only remaining ultimately to the Hudson's Bay Company; and even this, under Art. 8 of the Treaty of Ryswick, the French were entitled to (489).

Ante 1688—Maison François, on Lake Abbitibi, established (Ont. App., 98).

1695—Posts of Abbitibi and Nemiscau granted by letters patent to La Compagnie du Nord (Ont. App, 7).

1697—Treaty of Ryswick, whereby there was to be a mutual restoration of places possessed before the war; but commissioners were to determine the right "to the places situated in Hudson's Bay," and "the possession of those places which were taken by the French during the peace that preceded this present war, and were re-taken by the English during this war, shall be left to the French" (489).

1702—The Hudson's Bay Company complain of being left in possession of only one fort "out of seven they formerly possessed," that "they are surrounded by the French on every side, viz., by their settlements on the lakes and rivers from Canada to the northward, as also from Port Nelson (old York Fort) to the southward," and that "they may be said to be the only mourners by the peace" (564).

1702—The Hudson's Bay Company inform the Lords of Trade of the erection of a French fort at New Severn on the Bay, "whereby they have hindered the Indians from coming to trade at the Company's factory at the bottom of the Bay, [viz., Albany] so that the Company this year have not received above one-fifth part of the returns they usually had from thence, insomuch that the same does not answer the expense of their expedition" (564-5).

Ante 1703—A French post on Lake Mistassin founded (Ont. App., p. 101).

1711—The Hudson's Bay Company still in possession of only one fort (573), the other forts of the Bay being in possession of the French. They complain that "they are surrounded by the French on every side, viz., by their settlements on the lakes and rivers from Canada to the northward towards Hudson's Bay, as also from Port Nelson to the southward" (573).

1713—The Treaty of Utrecht, whereby the French were to "restore to the Kingdom and Queen of Great Britain the Bay and Straits of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the said Bay and Straits, and which belong thereunto;" and commissaries were to determine, within a year, "the limits which are to be fixed between the said Bay of Hudson and the places appertaining to the French" (504).

What the French actually "restored" under the Treaty does not fully appear, but they claimed that they were bound to restore only such places as the English could prove an incontrovertible title to (512, 515). That they did not consider themselves bound to give up any part of the interior country is evident as well from their retaining their old posts therein as by their establishing new ones.

(2) Old Posts retained and New Posts established by the French, to the North of the Height of Land, after the Treaty of Utrecht, and up to the Cession of Canada: 1713-1763.

Old Posts Retained:

Mistassin, on the Lake of that name, (D'Anville's Map of 1746; Ont. App., 108, 115; Joint App., 653, 655-6).

Nemiscau, on Lake Nemiscau, Rupert River, (Ont. App., 33, 117).

Fort Abbitibi, at the head of Lake Abbitibi, (Joint App., 581; Ont. App., 105-6, 108, 109, 115, 116, 119, 121).

Maison Française, at foot of Lake Abbitibi, (Ont. App., 105-6, 581).

Post on the Moose River, (Ont. App., 33).

Fort St. Germain, on Lake Ste. Anne, Albany River, (Ont. App., 105, 108, 109, 113, 116, 117, 119).

Posts of the Royal Domain of Tadoussac, extending back to Hudson's Bay, (Joint App., 653, 655-6; Ont. App., 33, 105).

Dependencies of Temiscamingue, extending back to Hudson's Bay, (Joint App., 581, 645, 652; Ont. App., 33).

Dependencies of Les Népigons, as including Post à la Carpe, extending to Hudson's Bay, (Joint App., 645, 647; Ont. App., 28).

And the jurisdiction of Kaministigouia, Michipicoten, and Ste. Marie du Sault, also extended beyond the Height of Land.

New Posts Established:

[And see the Posts of the North-West, sub-sec. (3) *infra*].

1715—Post on the Albany River—erection of complained of by the Hudson's Bay Company (196, 580).

1731—Maison des Dorvals, on Lake Mistassin (Ont. App., 105, 108).

1731—Operations of the Western Company in the region of Lake Mistassin (*Ib*).

1739—Post on Seal River, north of the Churchill (582).

1743—It is admitted that the French, by their operations in the interior, intercept the English trade, and that the Hudson's Bay Company's servants are incapable of venturing inland (580-1).

1747—Post on the Moose River (south branch), whereby the French secure the best of the trade (Ont. App., 33).

1747—Post on the Rupert River, by which the French almost monopolize the trade of the East Main (*Ib*).

[The Hudson's Bay Company had abandoned Fort Rupert and the Rupert River before this date (Ont. App., 33, 110, 115; Joint App., 582).]

1748—Evidence before Parliamentary Committee that the French in possession of the trade of the interior (Joint App., 581-2; and see Ont. App., 33).

1750—The Hudson's Bay Company represent in their memorial that "the French, since the said Treaty [of Utrecht], have made some settlements in different parts inland" (Ont. App., 34).

1751—Post à la Carpe, northward of Nepigon, and whose limits extend to Hudson's Bay—grant of (645, 647).

(3) French forts of the North-West, established after the Treaty of Utrecht, retained until the Cession of Canada, and never complained of by either the English Government or the Hudson's Bay Company.

1717—La Noüe is commissioned to re-establish Camanistiguoya; and to erect forts on Rainy Lake and Lake Winnipeg (640). He re-establishes Camanistiguoya (Ont. App., 16) and founds a post (Takamamioüen) on Rainy Lake (640-2).

1727—Post of the Sioux established by Boucher de Montbrun and Father Guignas (Ont. App., 12).

[*Operations of MM. de la Verendrye and their successors in the command*]:

1731—Fort St. Pierre, at the outlet of Rainy Lake, erected (Joint App., 183, 644-5; Ont. App., 16, 35).

1732—Fort St. Charles, on the Lake of the Woods (*Ib.*)

1733—Fort Rouge, on Red River, established; subsequently abandoned because of the proximity of Forts La Reine and Maurepas (Joint App. 183; Ont. App., 35).

1734—Fort Maurepas, at the mouth of the River Winnipeg (Joint App., 183, 643; Ont. App., 17, 35).

[1737—Pointe Du Bois fort, midway up the Red River (Ont. App., 106, 119).]

1738—Fort de la Reine, on the Assiniboine (Joint App., 183, 644-5; Ont. App., 17, 35).

1738—Fort, (headquarters of the Verendryes), on the St. Pierre, a tributary of the Assiniboine (Ont. App., 17).

1738—The country of the Mandans, at the Great Bend of the Missouri, visited, by way of the St. Pierre (Ont. App., 17, 28).

1742—The forks of the Saskatchewan reached (Ont. App., 17).

1742-3—The Upper Missouri revisited, by way of the St. Pierre, and the Yellowstone traversed as far as the Rocky Mountains; possession taken of the countries, and a fort erected (Ont. App., 17-19, 27, 28).

1748-9—Fort Dauphin, at the further end of Lake Manitoba (Joint App., 183, 644-5; Ont App., 19, 27, 35).

1749—Fort Bourbon, on the Saskatchewan (Joint App., 183, 643, 644-5; Ont. App., 17, 20, 27, 35).

Circ. 1750—Fort Poskoiac, on the Saskatchewan (*Ib*).

1752—Fort La Jonquière, at the sources of the Saskatchewan, and base of the Rocky Mountains, erected by the command of Le Gardeur de St. Pierre and Boucher De Niverville (Ont. App., 22).

St. Pierre succeeded Verendrye in the command in 1750, and visited all the forts. By his instructions, he was required to extend the discoveries, make treaties, and establish trading relations with the most distant Indian nations (Joint App., 643; Ont. App., 22). He, again, was succeeded by Saint Luc de la Corne.

Circ. 1753—Fort de la Corne (St. Louis or Nepawi), on the Saskatchewan, erected by M. de la Corne (Ont. App., 22, 70).

Ante 1757—Fort des Prairies, erected (Joint App., 644-5; Ont. App., 17).

II.

OPERATIONS OF THE HUDSON'S BAY COMPANY, OR BEARING UPON THEIR CLAIM.

1610-1615—Voyages of Hudson, Button, Bylot and Baffin, respectively, into Hudson's Bay (174, 560, 566).

1629—Conquest of Canada, by the English under Kirk (173-4).

1631—Voyages of Fox and James to the Bay, there having been none other in the interval since 1615 (*Ib*).

The above voyages were directed chiefly to the discovery of a North-West Passage, and were not followed by any kind of possession (175, 566).

1632—Treaty of St. Germain en Laye, whereby Canada is restored to the French (174, 453).

1668—Gillam's voyage, at the instance and under the guidance of the two renegade French Canadians, Radisson and Des Grosselliers (*Ib*).

There had been, from 1631, no other English voyage to the Bay,—an abandonment for a period of 37 years (175, 560, 566). The French, on the other hand, had visited it, both by sea and by the overland routes (*see supra*).

1668 } Fort Charles, on the Rupert, temporary establishment by Gillam, 1668; re-estab-
1670 } lished, 1670 (566). The French had, several years before, (in 1661), erected a fort upon this river, at Lake Nemiscau. Fort Charles or Rupert was captured by them in 1686.

1670—Charter of the Hudson's Bay Company, saving the possessions of "the subjects of any other Christian Prince or State" (341). The French had, long before, in 1627, included this region in the charter of the Company of the Hundred Associates, and after the surrender of this charter to the Crown, in 1663, it was included in the charter of 1664 to the Company of the West Indies (*supra*).

1670-1683—The Company during this period had only Fort Charles (or Rupert). The French, on the contrary, had several establishments (*supra*).

1682—The Company's governor, Bridgar, ordered to establish a fort and settlement at Port Nelson (585, 569). He finds the place in possession of the French, who seize him, with his people and effects (569, 622-3).

1683—Storehouses established at Charlton Island (570).

1683-5—The Company's servants refuse to visit the inland parts (585). The French on the contrary occupied, and were in possession of the trade of, the interior (*supra*).

1684—Fort Albany, on the Albany River, erected (570). The French establishment on Lake Ste. Anne, upon this river, was built eleven years previously (*supra*); and they captured Fort Albany in 1686 (*supra*).

1684—Fort Bourbon (in Port Nelson) taken from the French. This was the first occupancy by the Company of Port Nelson. (Manitoba App., 126; Joint App, 570) The French, on the other hand, had founded an establishment here in 1676; and re-established it in 1682 (*supra*).

1685—Moose Fort, at the mouth of the River Moose, erected (570). The French had built a fort on this river twelve years previously (*supra*). They captured Moose Fort in 1686 (*supra*).

1686—New Severn fort, erected (570); captured by the French in 1690 (Man. App., 125), and a new fort erected by the French there in 1702 (*supra*)

1688—Fort Churchill (or Prince of Wales), stated to have been erected this year, and to have been taken by the French the year following (Man. App. 125, 126).

The period 1686-1713 was one of conflict on the Bay, the forts at the mouths of the rivers being for a time alternately in the hands of each of the rival powers, with the ultimate result that Albany alone remained to the Company; but even Albany should have been surrendered to the French by virtue of the Treaty of Ryswick. The trade of Albany was crippled by the operations of the French at New Severn and at their establishments upon the lakes and rivers to the southward of James' Bay. (564-5).

1713—Treaty of Utrecht (*see supra*).

1713-1740—The Company hold certain posts on the margin of the Bay; but no post inland, before the erection of Henley House.

1740—Henley House, an inland post on the Albany River, erected (194).

1743-1749—The trade of the interior largely monopolized by the French (Joint App., 581-2, 716; Ont. App, 33), the Company's servants not proceeding inland (581-2, 716).

1747—The Company have a small establishment on East Main River (Ont. App., 33, 110).

1748—The Company's posts at this date:—York, Albany, Moose, Henley Factory (Ont. App., 110), East Main River (Ont. App., 33, 110).

1749—Fort Rupert had been before this time abandoned by the Company (Joint App., 582; Ont. App., 115).

1763—Treaty of Paris, whereby Canada was ceded to England. Thenceforward the Company had the same rights of entry upon the newly acquired territories as any other British subjects. Pursuant to this right they entered the North-West (which had been in the sole occupation of the French prior to the Treaty, and of the British and Canadian Traders subsequent to the Treaty) in 1774, when their first post there was built.

The Company admit that "as long as Canada was held by the French . . . . their servants waited at the forts built on the coast of the bay, and there bought, by barter, the furs which the Indians brought from the interior" (594); the same appears from the Company's Journals: "From a perusal of the Company's Journals, we find that it was not the practice of the Company's servants to go up country to purchase peltry from the Indians, but the Indians came down," etc., (716); but the Company admit, in 1719, "that the French, in 1715, made a settlement at the head of Albany River, . . . whereby they intercept the Indian trade from coming to the Company's factories," (579), and, in 1750, that "the French, since the said Treaty [of Utrecht], have at different times made some settlements in different parts inland, and have also carried on some trade within the said Company's limits," and they pray for a settlement of the limits, "and that the French should be obliged to remove all encroachments they have made within the said limits, by breaking up their settlements and restraining the wood-runners [*coureurs des bois*] from entering the same," etc., (Ontario App., 34, 35); it is shewn, 1742-9, that the French "intercept the English trade," that they "intercept the Indians coming down with their trade," that they "have out-factories, which the Company have not," that they "actually do winter among the natives, which the Company have not lately attempted," that they "went there first and are better beloved," that they secure "the valuable furs," "the light furs," "the choice skins," leaving only "the heavy goods" and "the refuse for the Company" (580, 581, Ont. App., 32-3).

The Company also admit that "after the Cession of Canada in 1763, British traders, following in the track of the French, . . . by building factories, brought

the market for furs nearer to the Indian seller," that, "the Company, finding their trade seriously affected, sent parties to establish themselves in the interior," that, "at the time of the passing of the Quebec Act, 1774, the Company had not extended their posts and operations far from the shores of the Bay," Henley being the only inland station whose Journals "have been preserved bearing that date" (594, 595).

1774—Fort Cumberland erected, being the Company's first post in the North-West (177-8, 588, 716). They had no other establishment in that region before 1790. Some of their subsequent establishments were as follows:—

1790—Lac La Pluie and Swan River (716).

1796—Assiniboine River (*Ib*).

1799—Red River (*Ib*).

III.

From the foregoing, the following propositions were deduced in the interest of the Province of Ontario:—

The French had settled upon the St. Lawrence in 1608. From this time, they gradually pushed back their trading operations and posts to the height of land and beyond, and drew the Indians of the northern slope and of Hudson's Bay, by the lakes and rivers, thither, and even to the posts of the St. Lawrence itself, to trade with them (and see Joint App., 476-7, 638).

Having the control of the trade, there being no rivals to divide it with them, and the country being unfit for ordinary settlement, the French did not find it necessary to establish posts on the shores of the Bay (*Ib*).

From the time, however, that the English attempted any settlement or trade in the Bay, the French prepared to push their establishments, and their trading operations, further north, pending the opportunity of driving the intruders wholly out of what they considered their own exclusive domain;

The French were the first actual possessors of the principal rivers that drain into the Bay, viz., of the Rupert, the Moose, the Albany and the Nelson—the waters of the Winnipeg, Saskatchewan and other rivers of the North-West, passing through the latter;

In due time they moved, by sea and land, against the establishments of the English, and practically drove the latter from the Bay, until, by the operation of the Treaty of Utrecht, the English were "restored" to some of their former possessions;

The French were the discoverers—and, up to the Cession of Canada, the sole possessors and occupants—of the region of the North-West, extending from the western watershed of Lake Superior to the Rocky Mountains, and from the Missouri and Yellowstone to the northern borders of the Saskatchewan and of the Winnipeg lake and river;

The French, after 1713, the date of the Treaty of Utrecht, and up to the Cession of Canada, continued to hold the territories upon the inland waters of the rivers of the northern slope, and the largest and best part of the trade—their domination extending on occasion, in certain parts—as at Rupert River, Seal River and La Carpe—to the shores of the Bay.

The possessory right of France was deduced from contiguity, priority of occupation, the enjoyment of the trade, her actual establishments, her disposition of these regions by her early charters, the titles conferred by the treaties of St. Germain en Laye and of Breda; and the charter of the Hudson's Bay Company—which in terms saved the possessions of the subjects of any other Christian Prince or State—was not intended to be, nor

could be, in derogation of the rights of France. These rights were, subsequently, extended or conserved by the Treaties of Neutrality and of Ryswick. And it was the contention of Ontario that the Treaty of Utrecht, which curtailed the theretofore admitted rights of France, and the Treaty of Paris, which put an end to those rights as respected Canada, could not put the Hudson's Bay Company—as a company, and apart from their rights in common with all the other British subjects—in any better position than that they had previously enjoyed; that the benefits thereunder enured not to the Company, but to the Imperial Crown of Great Britain on behalf of the nation at large; and that therefore it was competent for the Crown, (or the Crown and Parliament), on the formation of the Province of Upper Canada, now Ontario, to give—and *that it did give*—to the Province such extension as was deemed desirable, without regard to any limitation constructively arising upon the Company's claims regarding their territorial rights under the original terms of their charter. This view—embodied in various acts of state and instruments of authority—was given effect to in the Award of the Arbitrators, whereby the boundary was carried to the shores of James' Bay, and was subsequently adopted in effect by the Imperial Privy Council and by the Parliament of Canada, and confirmed by Act of the Imperial Parliament.

C.

IMPERIAL ORDER IN COUNCIL, EMBODYING HER MAJESTY'S DECISION.

At the Court, at Osborne House, Isle of Wight, the 11th day of August, 1884.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY.

His Royal Highness the Prince of Wales.

Lord President, - - - - - -	Earl of Northbrook,
Lord Steward, - - - - - - -	Sir T. Erskine May,
Earl Granville, - - - - - -	Sir A. Cooper Key.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 22nd of July last past, in the words following, viz:

"Your Majesty having been pleased by your Order in Council of the 26th June, 1884, to refer unto this Committee the humble petition of Oliver Mowat, Your Majesty's Attorney-General for the Province of Ontario, as representing that Province, and of James Andrews Miller, Your Majesty's Attorney-General for the Province of Manitoba, as representing that Province, in the matter of the boundary between the Provinces of Ontario and Manitoba, in the Dominion of Canada, between the Province of Ontario of the one part and the Province of Manitoba of the other part, setting forth that a question has arisen, and is in dispute, between the Provinces of Ontario and Manitoba, respecting the western boundary of the Province of Ontario, and it has been agreed between those Provinces to submit such question to Your Majesty in Council for determination; the following Special Case has accordingly been agreed upon between the petitioners as representing the two Provinces aforesaid:—

"'Special Case.

"'The Province of Ontario claims that the western boundary of that Province is either (1) the meridian of the most north-westerly angle of the Lake of the Woods, as described

in a certain Award made on the 3rd August, 1878, by the Honourable Chief Justice Harrison, Sir Edward Thornton, and Sir Francis Hincks, or (2) is a line west of that point.

"'The Province of Manitoba claims that the boundary between that Province and the Province of Ontario is (1) the meridian of the confluence of the Ohio and Mississippi Rivers, or (2) is that portion of the height of land dividing the waters which flow into Hudson's Bay from those which empty into the valley of the Great Lakes, and lying to the west of the said meridian line.

"'It has been agreed to refer the matter to the Judicial Committee of Her Majesty's Privy Council, and an Appendix has been prepared containing the materials agreed to be submitted with this Case for the adjudication of the dispute; each and every of the particulars in the said Appendix is submitted *quantum valeat*, and not otherwise.

"'In addition to the particulars set forth in the Appendix, any historical or other matter may be adduced which, in the opinion of either party, may be of importance to the contention of such party, and (subject to any rule or direction of the Judicial Committee in that behalf) such additional matter is to be printed as a separate Appendix by the party adducing the same, and copies are to be furnished at least ten days before the argument.

"'The book known as the Book of Arbitration Documents may be referred to in the argument for the purpose of shewing in part what materials were before the Arbitrators.

"'It is agreed that in the discussion before the Judicial Committee of the Privy Council reference may be made to any evidence of which judicial notice may be taken, or which (having regard to the nature of the case and the parties to it) the Privy Council may think material and proper to be considered, whether the same is or is not contained in the printed papers.

"'The questions submitted to the Privy Council are the following:—

"'(1) Whether the Award is or is not, under all the circumstances, binding?

"'(2) In case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said Provinces?

"'(3) Whether, in case legislation is needed to make the decision on this case binding or effectual, Acts passed by the Parliament of Canada and the Provincial Legislatures of Ontario and Manitoba in connection with the Imperial Act 34 and 35 Vict., cap. 28, or otherwise, will be sufficient, or whether a new Imperial Act for the purpose will be necessary.

"'O. Mowat,
"'Attorney-General of Ontario.

"'James A. Miller,
"'Attorney-General of Manitoba.'"

"And humbly praying that Your Majesty in Council will be pleased to take the said Special Case into consideration, and that the said Special Case may be referred by Your Majesty to the Lords of the Judicial Committee of the Privy Council to report thereon to Your Majesty at the Board, and that such Order may be made thereupon as to Your Majesty shall seem meet. The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, have taken the said humble Petition and Special Case into consideration, and having heard counsel for the Province of Ontario, and also for the Province of Manitoba, their Lordships do this day agree humbly to report to Your Majesty as their opinion:—

"1. That legislation by the Dominion of Canada, as well as by the Province of Ontario, was necessary to give binding effect as against the Dominion and the Province to the Award of the 3rd August, 1878, and that, as no such legislation has taken place, the Award is not binding.

"2. That, nevertheless, their Lordships find so much of the boundary lines laid down by that Award as relate to the territory now in dispute between the Province of Ontario and the Province of Manitoba to be substantially correct and in accordance with the conclusions which their Lordships have drawn from the evidence laid before them.

"3. That, upon the evidence, their Lordships find the true boundary between the western part of the Province of Ontario and the south-eastern part of the Province of Manitoba to be so much of a line drawn to the Lake of the Woods, through the waters eastward of that lake and west of Long Lake, which divide British North America from the territory of the United States, and thence through the Lake of the Woods to the most north-western point of that lake, as runs northward from the United States boundary, and from the most north-western point of the Lake of the Woods a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul, or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and their Lordships find the true boundary between the same two Provinces to the north of Ontario and to the south of Manitoba, proceeding eastward from the point at which the before mentioned line strikes the middle line of the course of the river last aforesaid, to be along the middle line of the course of the same river (whether called by the name of the English River or, as to the part below the confluence, by the name of the River Winnipeg) up to Lake Seul, or the Lonely Lake, and thence along the middle line of Lake Seul, or the Lonely Lake, to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves, until it reaches a line drawn due north from the confluence of the rivers Mississippi and Ohio which forms the boundary eastward of the Province of Manitoba.

"4. That without expressing an opinion as to the sufficiency or otherwise of concurrent legislation of the Provinces of Ontario and Manitoba, and of the Dominion of Canada (if such legislation should take place), their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual."

Her Majesty, having taken the said Report into consideration, was pleased by and with the advice of Her Privy Council to approve thereof, and to order, as it is hereby ordered, that the same be punctually observed, obeyed and carried into execution. Whereof the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario, the Lieutenant-Governor of the Province of Manitoba, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

C. L. Peel.

D.

JOINT ADDRESS OF THE SENATE AND HOUSE OF COMMONS OF CANADA, AND THE PROCEEDINGS IN PARLIAMENT THEREON.

In the House of Commons of Canada.

29th April, 1889.

The House, according to Order, resolved itself into a Committee to consider a certain proposed Resolution, on which to found an Address to Her Majesty, respecting the westerly, northerly and easterly boundaries of the Province of Ontario. * * *

Mr. Colby reported that the Committee had come to a Resolution.

Ordered, that the report be now received.

Mr. Colby reported the Resolution accordingly, and the same was read, * * *

The said Resolution, being read a second time, was agreed to.

Resolved that a select Committee, composed of Sir John A. Macdonald, Sir Hector L. Langevin, Messieurs Mills (Bothwell), Bowell and Shanly, be appointed to draft an Address to Her Majesty, founded on the said Resolution.

Sir John A. Macdonald reported, from the Select Committee appointed to draw up an Address to Her Majesty, that they had drawn up an Address accordingly, and the same was read as followeth. * * *

The said Address, being read a second time, was agreed to. * * *

1st May, 1889.

Mr. Speaker acquainted the House, That a Message had been brought from the Senate, by their Clerk, as followeth :—

The Senate have agreed to the Address to Her Majesty the Queen, on the subject of the westerly, northerly and easterly boundaries of the Province of Ontario, and declaring it desirable that an Act of the Parliament of the United Kingdom of Great Britain and Ireland should be passed defining the same,

And also, the Senate have agreed to an Address to His Excellency the Governor General, praying that His Excellency will be pleased to transmit the Joint Address of both Houses to Her Majesty on the subject of the westerly, northerly and easterly boundaries of the Province of Ontario, and declaring it desirable that an Act of the Parliament of the United Kingdom of Great Britain and Ireland should be passed defining the same, to which the Senate desire the concurrence of this House.

On motion of Sir Hector L. Langevin, seconded by Sir Adolphe P. Caron,

Resolved, That this House doth concur in the Address of the Senate to His Excellency the Governor General, praying him to transmit the Joint Address of both Houses to Her Majesty on the subject of the westerly, northerly and easterly boundaries of the Province of Ontario, and declaring it desirable that an Act of the Parliament of the United Kingdom of Great Britain and Ireland should be passed defining the same, in such a way as to His Excellency may seem fit, in order that the same may be laid at the foot of the Throne.

[THE JOINT ADDRESS, AS PASSED.]

To the Queen's Most Excellent Majesty :

Most Gracious Sovereign :

We, your Majesty's most dutiful and loyal subjects the Senate and Commons of Canada in Parliament assembled, humbly approach your Majesty with the request that your Majesty may be graciously pleased to cause a measure to be submitted to the Parliament of the United Kingdom of Great Britain and Ireland, declaring and providing the following to be the westerly, northerly and easterly boundaries of the Province of Ontario, that is to say :—

Commencing at the point where the international boundary between the United States of America and Canada strikes the western shores of Lake Superior ; thence westerly along the said boundary to the north-west angle of the Lake of the Woods, thence along a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and thence proceeding eastward from the point at which the before mentioned line strikes the middle line of the course of the river last aforesaid, along the middle line of the course of the same river (whether called by the name of the English River, or, as to the part below the confluence, by the name of the River Winnipeg) up to Lake Seul or the Lonely Lake, and thence along the middle line of Lake Seul or Lonely Lake to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the

river by which the waters of Lake St. Joseph discharge themselves to the shore of the part of Hudson's Bay commonly known as James' Bay, and thence south-easterly following upon the said shore to a point where a line drawn due north from the head of Lake Temiscamingue would strike it, and thence due south along the said line to the head of the said lake, and thence through the middle channel of the said lake, into the Ottawa River, and thence descending along the middle of the main channel of the said river to the intersection by the prolongation of the western limit of the Seigneurie of Rigaud, such mid-channel being as indicated on a map of the Ottawa Ship Canal Survey, made by Walter Shanly, C.E., and approved by Order of the Governor-General in Council, dated the 21st July, 1886, and thence southerly, following the said westerly boundary of the Seigneurie of Rigaud to the south-west angle of the said Seigneurie, and thence southerly along the western boundary of the augmentation of the Township of Newton to the north-west angle of the Seigneurie of Longueuil, and thence south-easterly along the south-western boundary of said Seigneurie of New Longueuil to a stone boundary on the north bank of the Lake St. Francis, at the cove west of Point au Baudet, such line, from the Ottawa River to Lake St. Francis, being as indicated on a plan of the line of boundary between Upper and Lower Canada, made in accordance with the Act 23 Victoria, Chapter 21, and approved by Order of the Governor-General in Council, dated the 16th of March, 1861.

(Journals, House of Commons, Canada, 1889.)

E.

ACT OF THE IMPERIAL PARLIAMENT, 52 AND 53 VICT., CHAP. 28.

An Act to declare the Boundaries of the Province of Ontario, in the Dominion of Canada.

[12th August, 1889.]

Whereas the Senate and Commons of Canada in Parliament assembled have presented to Her Majesty the Queen the Address set forth in the schedule to this Act respecting the boundaries of the Province of Ontario ;

And whereas the Government of the Province of Ontario have assented to the boundaries mentioned in that Address ;

And whereas such boundaries, so far as the Province of Ontario adjoins the Province of Quebec, are identical with those fixed by the proclamation of the Governor-General issued in November, one thousand seven hundred and ninety-one, which have ever since existed ;

And whereas such boundaries, so far as the Province of Ontario adjoins the Province of Manitoba, are identical with those found to be the correct boundaries by a report of the Judicial Committee of the Privy Council, which Her Majesty the Queen in Council, on the eleventh day of August, one thousand eight hundred and eighty-four, ordered to be carried into execution ;

And whereas it is expedient that the boundaries of the Province of Ontario should be declared by authority of Parliament in accordance with the said Address ;

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as the Canada (Ontario Boundary) Act, 1889.

2. It is hereby declared that the westerly, northerly, and easterly boundaries of the Province of Ontario are those described in the Address set forth in the schedule to this Act.

SCHEDULE.

ADDRESS TO THE QUEEN FROM THE SENATE AND HOUSE OF COMMONS OF CANADA.

We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada, in Parliament assembled, humbly approach Your Majesty with the request that Your Majesty may be graciously pleased to cause a measure to be submitted to the Parliament of the United Kingdom declaring and providing the following to be the westerly, northerly and easterly boundaries of the Province of Ontario, that is to say:—

Commencing at the point where the international boundary between the United States of America and Canada strikes the western shores of Lake Superior, thence westerly along the said boundary to the north-west angle of the Lake of the Woods, thence along a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul, or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and thence proceeding eastward from the point at which the before mentioned line strikes the middle line of the course of the river last aforesaid, along the middle line of the course of the same river (whether called by the name of the English River or, as to the part below the confluence, by the name of the River Winnipeg) up to Lake Seul, or the Lonely Lake, and thence along the middle line of Lake Seul or Lonely Lake to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves to the shore of the part of Hudson's Bay commonly known as James' Bay, and thence south-easterly, following upon the said shore to a point where a line drawn due north from the head of Lake Temiscamingue would strike it, and thence due south along the said line to the head of the said lake, and thence through the middle channel of the said lake into the Ottawa River, and thence descending along the middle of the main channel of the said river to the intersection by the prolongation of the western limits of the Seigneurie of Rigaud, such mid-channel being as indicated on a map of the Ottawa Ship Canal Survey made by Walter Shanly, C. E., and approved by Order of the Governor-General in Council, dated the twenty-first July, one thousand eight hundred and eighty-six; and thence southerly, following the said westerly boundary of the Seigneurie of Rigaud to the south-west angle of the said Seigneurie, and then southerly along the western boundary of the augmentation of the Township of Newton to the north-west angle of the Seigneurie of Longueuil, and thence south-easterly along the south-western boundary of the said Seigneurie of New Longueuil to a stone boundary on the north bank of the Lake St. Francis, at the cove west of Point au Baudet, such line from the Ottawa River to Lake St. Francis being as indicated on a plan of the line of boundary between Upper and Lower Canada, made in accordance with the Act 23 Victoria, chapter 21, and approved by Order of the Governor-General in Council, dated the 16th of March, 1861.

RETURN

To an Order of the Legislative Assembly, dated 4th February, 1889, for a return showing the location of any Houses of Industry, Poor Houses, or similar institutions, for the care and maintenance of indigent persons, now established in any of the cities, towns and counties, in the Province of Ontario, at the total or partial cost of any Municipality, and distinguishing those partly and those wholly supported by such municipality; the number of inmates permanently or temporarily lodged in each such institution during the years 1887 and 1888, and their age and sex, with a classification of the supposed causes of pauperism, and the length of detention of such inmates, where any have been committed for short periods; the dietary used in these institutions; the amount expended upon the erection and improvement of buildings since the establishment of any such institution, and the cost of lands connected therewith; the extent, if any, of land annually under cultivation, and the money value of returns therefrom during the years named; the annual money value, if any, of the products of the labour of the inmates; the per capita daily or annual cost of actual maintenance, during 1887 and 1888, of the inmates of such institution, less interest on invested capital, and plus the salaries of officials; the number and salaries of attendants, surgeons, and other officials; the number of inmates of such institutions in each of the years named, regarded as imbecile, idiotics, or insane, and of the blind, epileptic or deaf and dumb; and the number of committals of inmates of any such institution to cells or other solitary confinement as punishment, in 1887 and 1888, and the period during which they were so held in confinement.

Presented to the Legislative Assembly.

By Command,

J. M. GIBSON,
Secretary.

Provincial Secretary's Office,
Toronto, 18th March, 1889.

(Mr. Clarke, Wellington.)

RETURN to an Order of the Legislative Assembly, dated 4th February, 1889, for a return the care and maintenance of indigent persons, now established in any of the cities, towns pality, and distinguishing those partly and those wholly supported by such institutions during the years 1887 and 1888, and their age and sex, with a classification any have been committed for short periods; the dietary used in these institutions; establishment of any such institution, and the cost of lands connected therewith; therefrom during the years named; the annual money value, if any, of the products during 1887 and 1888, of the inmates of such institution, less interest on invested and other officials; the number of inmates of such institutions in each of the years dumb; and the number of committals of inmates of any such institution to cells or they were so held in confinement.

NAME.	Is it maintained at the total cost of the Municipality?	If not, what proportion of the cost is paid from other sources?	What are these other sources?	How many persons were permanently or temporarily lodged during the year ending 31st December, 1887?			How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?		
				M.	F.	T.	M.	F.	T.
County of Elgin House of Industry, 3 miles W. of St. Thomas.	Yes	....	....	65	36	101	76	33	109
" Waterloo " Berlin	"	....	....	72	36	108	79	39	118
" York " Newmarket.....	"	....	....	107	43	150	112	45	157
" Lincoln " ½ mile from St. Catharines	"	....	...	28	22	50	28	24	52
" Middlesex " Nr. Strathroy	"	....	....	85	41	126	84	43	127
" Norfolk " Gore of Woodhouse.....	"	....	....	47	13	60	56	19	75
" Wellington " Tp. of Nichol, Nr. Fergus	"	....	....	57	33	90	69	42	111
" Welland " Tp. of Thorold.....	"	....	....	.....	....	....	44	15	59
" Brant " Brantford	"	....	....	.....	....	....	.....	....	....
Totals	....	....	. ..	461	224	685	548	260	808

showing the location of any Houses of Industry, Poor Houses, or similar institutions, for and counties, in the Province of Ontario, at the total or partial cost of any Municimunicipality; the number of inmates permanently or temporarily lodged in each such of the supposed causes of pauperism, and the length of detention of such inmates, where the amount expended upon the erection and improvement of buildings since the the extent, if any, of land annually under cultivation, and the money value of returns of the labour of the inmates; the per capita daily or annual cost of actual maintenance, capital, and plus the salaries of officials; the number and salaries of attendants, surgeons, named, regarded as imbecile, idiotics, or insane, and of the blind, epileptic or deaf and other solitary confinement as punishment, in 1887 and 1888, and the period during which

What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution?	What was the cost of the lands connected with the Institution?	What is the extent thereof?	How much is under cultivation?	What was the money value of the returns from such cultivated land during 1887?	What was the money value of the returns from such cultivated land during 1888?	What was the annual money value of the products of the labour of the inmates, if any, during 1887?	What was the annual money value of the products of the labour of the inmates, if any, during 1888?	What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but including interest on invested capital, in 1887?	What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888?	No. of insane inmates in 1887.			No. of insane inmates in 1888.		
$ c.	$ c.	Ac.	Ac.	$ c.	$ c.	$ c.	$ c.	$ c.	$ c.	M.	F.	T.	M.	F.	T
10,783 00	3,000 00	50	35	971 00	915 00	*Nil.*	*Nil.*	55 12	55 64	3	2	5	3	2	5
15,088 00	9,024 00	141	97	2,033 00	1,740 00	800 00	800 00	51 87	49 66	1	...	1	1	...	1
26,062 00	4,500 00	51½	51½	1,470 00	1,362 00	No record.		57 59	57 98	3	5	8	6	4	10
14,500 00	5,000 00	50	45	1,085 00	1,010 00	600 00	600 00	92 32	83 63	....	2	2	....	...	..
28,320 00	3,300 00	45	25	1,048 00	936 00	300 00	310 00	58 24	54 60	1	...	1	...	...	..
6,450 00	3,000 00	100	75	454 00	629 00	454 00	629 00	38 44	40 33	....	...	..	....	1	1
29,390 00	2,900 00	58	30	No record.		No record.		73 79	63 97	....	...	..	....	...	..
1,543 00	3,600 00	60	60	This house was only opened in June, 1888.						....	...	..	....	...	..
14,300 00	Given.	50	35	.....	600 00	Not opened until January, 1889.				....	...	..	....	...	..
146,436 00	34,324 00	605½	453½	7,061 00	7,192 00	2,154 00	2,339 00	61 05	57 97	8	9	17	10	7	17

RETURN to an Order of the Legislative Assembly, dated 4th February, 1889, for

NAME.	No. of imbecile inmates in 1887.			No. of imbecile inmates in 1888.			No. of idiotic inmates in 1887.		
	M.	F.	T.	M.	F.	T.	M.	F.	T.
County of Elgin House of Industry, 3 miles W. of St. Thomas.	4	3	7	3	3	6	3	4	7
" Waterloo " Berlin	2	5	7	4	8	12	1	3	4
" York " Newmarket	20	12	32	17	15	32	5	1	6
" Lincoln " ½ mile from St. Catharines	5	5	10	3	4	7	....	1	1
" Middlesex " Nr. Strathroy	5	7	12	3	4	7	....	3	3
" Norfolk " Gore of Woodhouse	3	2	5	3	2	5	....	....	....
" Wellington " Tp. of Nichol, Nr. Fergus.	....	....	....	22	13	35	....	....	....
" Welland " Tp. of Thorold	....	....	....	....	....	....	....	....	....
" Brant " Brantford	....	....	....	....	....	....	....	....	....
Totals	39	34	73	55	49	104	9	12	21

a return showing the location of any Houses of Industry, Poor Houses, etc.—*Continued.*

No. of idiotic inmates in 1888.			No. of epileptic inmates in 1887.			No. of epileptic inmates in 1888.			No. of blind inmates in 1887.			No. of blind inmates in 1888.			No. of deaf and dumb inmates in 1887.			No. of deaf and dumb inmates in 1888.		
M.	F.	T.	M.	F.	T.	M.	F.	T.	M.	F.	T.	M.	F.	T.	M.	F.	T.	M.	F.	T.
4	6	10	2	1	3	1	....	1	4	1	5	5	2	7	1	....	1	1	....	1
2	3	5	1	....	1	1	....	1	5	1	6	7	1	8	1	1	2	1	1	2
6	4	10	....	1	1	1	1	2	2	4	6	2	2	4	1	....	1	1	....	1
....	....	....	....	1	1	1	....	1	....	2	2	....	....	....	....	1	1	....	....	....
....	3	3	1	3	4	....	3	3	6	1	7	4	1	5	1	....	1	1	....	1
....	....	....	1	...	1	1	1	2	3	....	3	3	....	3	....	....	....	....	....	....
....	....	....	....	....	....	3	1	4	..	....	....	4	1	5	....	....	....	....	....	....
....	...	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
12	16	28	5	6	11	8	6	14	20	9	29	25	7	32	4	2	6	4	1	5

COUNTY OF ELGIN HOUSE OF INDUSTRY AND REFUGE.

RETURN by the County of Elgin of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established	County of Elgin House of Industry and Refuge.
Where situated?.....	Township of Southwold, three miles west of St. Thomas.
Is it maintained at the total cost of the Municipality?	Yes, of the County of Elgin.
If not, what proportion of the cost is paid from other sources?	*Nil.*
What are these other sources?	*Nil.*
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887?	Males, 65; females, 36; total, 101.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?	Males, 76; females, 33; total 109.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution?	$10,783 29.
What was the cost of the lands connected with the Institution?	$3,000 00.
What is the extent thereof?	50 acres.
How much is under cultivation?.....	35 acres.
What was the money value of the returns from such cultivated land during 1887?	$971 15.
What was the mcney value of the returns from such cultivated land during 1888?	$915 50.
What was the annual money value of the products of the labour of the inmates, if any, during 1887?	*Nil.*
What was the annual money value of the products of the labour of the inmates, if any, during 1888?	*Nil.*
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887?	$55 12.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888?	$55 64.

County of Elgin House of Industry and Refuge.—*Continued.*

Table shewing the supposed cause of the Pauperism of the Inmates of the Institution.

Supposed Cause.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Sickness	4	6	10	8	6	14
Destitution	8	2	10	7	3	10
Intemperance	19	.....	19	19	.....	19
Cripple	2	3	5	6	4	10
Old Age	1	2	3	2	1	3
Blind	4	1	5	5	2	7
Idiotic, etc.	13	10	23	11	11	22
All other causes	14	12	26	18	6	24
Total	65	36	101	76	33	109

Table shewing the Ages of the Inmates of the Institution.

Ages.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 15 years	14	11	25	19	8	27
From 15 to 20 years	1	3	4	1	6	7
20 to 25 years	1	3	4	1	2	3
25 to 30 years	0	2	2	0	1	1
30 to 35 years	0	1	1	0	1	1
35 to 40 years	3	0	3	4	1	5
40 to 45 years	3	2	5	2	2	4
45 to 50 years	3	2	5	5	1	6
50 to 55 years	2	1	3	3	2	5
55 to 60 years	3	3	6	2	2	4
60 to 65 years	6	1	7	9	1	10
65 to 70 years	8	3	11	5	4	9
70 to 75 years	7	1	8	7	0	7
75 to 80 years	5	0	5	8	0	8
80 to 85 years	4	1	5	5	1	6
85 to 90 years	5	2	7	3	1	4
Over 90 years	.....	.....	.....	2	.....	2
Total	65	36	101	76	33	109

COUNTY OF ELGIN HOUSE OF INDUSTRY AND REFUGE.—*Continued.*

Table shewing the Salaries of the Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887, Salary.	1888, Salary.	Allowances, if any.
	$ c.	$ c.	
Inspector	80 00	80 00	*Nil.*
Physician	200 00	200 00	"
Keeper	350 00	350 00	"
Matron	200 00	200 00	"
Matron, Assistant	120 00	120 00	"
Total	950 00	950 00	

Table shewing how many of the Inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

	IMBECILE.			IDIOTIC.			INSANE.			BLIND.			EPILEPTIC.			DEAF AND DUMB.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887	4	3	7	3	4	7	3	2	5	4	1	5	2	1	3	1	....	1
In 1888	3	3	6	4	6	10	3	2	5	5	2	7	1	....	1	1	....	1
Total	7	6	13	7	10	17	6	4	10	9	3	12	3	1	4	2	....	2

Table shewing period of Detention of those committed to the Institution for short periods.

PERIOD OF DETENTION.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 10 days *						
10 to 30 days						
30 to 60 days						
60 to 90 days	3	1	4	6	2	8
90 days and over	62	35	97	70	31	101
Total	65	36	101	76	33	109

* No inmate was committed for a stated or short period.

County of Elgin House of Industry and Refuge.—*Continued.*

Table shewing the number of Committals of Inmates of the Institutions to cells or solitary confinement as punishment, and the periods there.

1887, Number.	Period of Confinement.	1888, Number.	Period of Confinement.
	Nil.		*Nil.*

Details of Dietary issued to the Inmates.

Breakfast :

Bread, tea, porridge and milk or molasses ; and to those working hard, cold meat.

Dinner :

Bread, meat (boiled, roast or hash) or fish, potatoes, or soup, carrots, or parsnips, or onions, or cabbage, or beans, etc., water or milk.

Supper :

Bread, tea, butter ; boiled rice, with milk, or syrup ; milk custard or apple sauce, etc.

Summary of Daily Rations :

Meat, ½ lb. per head daily, including bone.
Butter, " " no record.
Oatmeal, " " "
Tea, " " "

K. W. McKAY,
County Clerk.

HOUSE OF INDUSTRY AND REFUGE, COUNTY OF WATERLOO AT BERLIN.

Return by the County Clerk, County of Waterloo, of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established	House of Industry and Refuge of the County of Waterloo. Established (opened) 1st June, 1869.
Where situated ?.....	Berlin.
Is it maintained at the total cost of the Municipality ?	Yes—County of Waterloo.
If not, what proportion of the cost is paid from other sources ?	
What are these other sources ?.....	
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887 ?	Males, 72 ; females, 36 ; total, 108.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888 ?	Males, 79 ; females, 39 ; total 118.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution ?	$15,088 00.
What was the cost of the lands connected with the Institution ?	$9,024 00.
What is the extent thereof ?	141 acres.
How much is under cultivation ?.	97 acres.
What was the money value of the returns from such cultivated land during 1887 ?	$2,033 00 (approximate est.)
What was the money value of the returns from such cultivated land during 1888 ?	$1,740 00 "
What was the annual money value of the products of the labour of the inmates, if any, during 1887 ?	$800 00 "
What was the annual money value of the products of the labour of the inmates, if any, during 1888 ?	$800 00 "
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887 ?	$51 87 (average number during the year, 90⅓.)
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888 ?	$49 66 (average number of inmates during the year 88½.)

House of Industry and Refuge County of Waterloo.—*Continued.*

Table shewing the supposed cause of the pauperism of the inmates of the Institution.

Supposed Cause.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
Blind	5	1	6	7	1	8
Deaf and Dumb	1	1	2	1	1	2
Imbecile	2	5	7	4	8	12
Crippled	4	1	5	4	1	5
Idiotic	1	3	4	2	3	5
Intemperance	25	1	26	19	1	20
Sick and Destitute	28	18	46	36	18	54
Enciente	.....	6	6	.....	5	5
Epilepsy	1	.....	1	1	.....	1
Insane	1	.....	1	1	.....	1
Born in the House	2	.....	2	2	.....	2
Mother in the House	2	.....	2	2	.....	2
Deserted by Husband	.....	.....	.....	.....	1	1
Total	72	36	108	79	39	118

Table shewing the ages of the inmates of the Institution.

Ages.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
Under 15 years	5	.....	5	4	1	5
From 15 to 20 years	1	1	2	1	1	2
20 " 25 "	.....	5	5	.....	4	4
25 " 30 "	.....	5	5	1	4	5
30 " 35 "	2	1	3	2	3	5
35 " 40 "	1	1	2	3	.....	3
40 " 45 "	5	.....	5	3	1	4
45 " 50 "	6	2	8	8	3	11
50 " 55 "	3	1	4	2	1	3
55 " 60 "	2	.....	2	3	1	4
60 " 65 "	13	2	15	10	3	13
65 " 70 "	7	3	10	10	2	12
70 " 75 "	7	7	14	10	6	16
75 " 80 "	9	4	13	9	5	14
80 " 85 "	7	2	9	10	3	13
85 " 90 "	3	2	5	1	1	2
Over 90 years	1	.....	1	2	.....	2
Total	72	36	108	79	39	118

HOUSE OF INDUSTRY AND REFUGE, COUNTY OF WATERLOO.—*Continued.*

Table shewing the Salaries of Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887. Salary.	1888. Salary.	ALLOWANCES, IF ANY.
	$ c.	$ c.	
Inspector	100 00	100 00	
Physician	200 00	200 00	Medicines found by County.
Keeper	560 00	560 00	Board and Lodging in the House.
Matron	140 00	140 00	" "
Assistant Keeper	180 00	180 00	" "
Teamster	180 00	180 00	" "
Female Servant	117 00	117 00	" "
do	78 00	78 00	" "
Total	1,555 00	1,555 00	

Table shewing how many of the Inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

—	IMBECILE.			IDIOTIC.			INSANE.			BLIND.			EPILEPTIC.			DEAF & DUMB		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887.	2	5	7	1	3	4	1	....	1	5	1	6	1	....	1	1	1	2
In 1888.	4	8	12	2	3	5	1	....	1	7	1	8	1	....	1	1	1	2
Total ..	6	13	19	3	6	9	2	.. .	2	12	2	14	2	....	2	2	2	4

Table shewing period of detention of those committed to the Institution for short periods.

PERIOD OF DETENTION.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 10 days						
10 to 30 days						
30 to 60 days						
60 to 90 days	1		1			
90 days and over						
Total	1		1			

House of Industry and Refuge, County of Waterloo.—*Continued.*

Table shewing the number of Committals of Inmates of the Institutions to cells or solitary confinement as punishment, and the periods there.

Number, 1887.	Period of Confinement.	Number, 1888.	Period of Confinement.
5	12 to 24 hours.	4	12 to 24 hours.

Details of dietary issued to the inmates.

Breakfast :

Oatmeal porridge, milk, bread, coffee and butter or molasses.

Dinner :

Vegetable soup, beef, potatoes, pickles, bread and butter or molasses, milk or water

Supper :

Cold meat, fried potatoes, bread and molasses, tea, corn meal porridge, and apple sauce.

Summary of Daily Rations :

Bread, meat, butter, oatmeal, tea. Rations are not weighed. The inmates are helped to all they want out of the above bill of fare.

ISRAEL D. BOWMAN,
County Clerk.

Berlin, 5th March, 1889.

COUNTY OF YORK INDUSTRIAL HOME.

Return by the Inspector and Keeper of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established.....	County of York Industrial Home, opened January 16th, 1883.
Where situated?.....	Near Newmarket, on lot 93 in 1st con. of King.
Is it maintained at the total cost of the Municipality?	Yes.
If not, what proportion of the cost is paid from other sources?	None.
What are these other sources?.....	None.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887?	Males, 107; females, 43; total, 150.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?	Males, 112; females, 45; total, 157.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution?	Cost of main building .....$17,200 Additions and outbuildings since opened ..... 8,862 Total expenditure on capital account....$26,062
What was the cost of the lands connected with the Institution?	$4,500.
What is the extent thereof?.....	51½ acres.
How much is under cultivation?.....	All.
What was the money value of the returns from such cultivated land during 1887?	$1,470 00.
What was the money value of the returns from such cultivated land during 1888?	$1,362 00.
What was the annual money value of the products of the labour of the inmates, if any, during 1887?	No estimate made, the Keeper and the men inmates do all the work on the farm. The Matron with, most of the time, two girls, assisted by the female inmates, do the work in the Home.
What was the annual money value of the products of the labour of the inmates, if any, during 1888?	
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887?	$1 10¾ per week, or $57 59 per annum.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888?	$1 11½ per week, or $57 98 per annum.

COUNTY OF YORK INDUSTRIAL HOME.—*Continued.*

Table shewing the supposed cause of the pauperism of the Inmates of the Institution.

SUPPOSED CAUSE.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
Intemperance	51	3	54	59	8	67
Imbecile	20	12	32	17	16	33
Idiotic	5	1	6	6	4	10
Insane	3	5	8	6	4	10
Blind	2	4	6	2	2	4
Epileptic	.....	1	1	1	.....	1
Children	20	12	32	16	6	22
Who pay for board	3	.....	3	5	.....	5
Vagrant	.....	1	1	.....	.....	.....
Girls who have children in Home	.....	3	3	.....	4	4
Deaf and Dumb	1	.....	1	1	.....	1
Cause not given	3	.....	3	.....	.....	.....
Total	107	43	150	113	44	157

Table shewing the ages of the Inmates of the Institution.

AGES.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
Under 15 years	20	9	29	17	6	23
From 15 to 20 years	2	5	7	2	2	4
20 to 25 "	3	3	6	3	.....	3
25 to 30 "	1	2	3	2	2	4
30 to 35 "	1	2	3	1	3	4
35 to 40 "	.....	.....	.....	1	2	3
40 to 45 "	3	3	6	3	2	5
45 to 50 "	6	3	9	6	2	8
50 to 55 "	5	3	8	4	3	7
55 to 60 "	6	2	8	9	4	13
60 to 65 "	8	1	9	6	1	7
65 to 70 "	14	3	17	16	2	18
70 to 75 "	11	4	15	14	6	20
75 to 80 "	14	2	16	17	4	21
80 to 85 "	4	.....	4	6	1	7
85 to 90 "	2	1	3	2	1	3
Over 90 years	2	1	3	2	.....	2
Ages not given	4	.....	4	4	1	5
Total	106	44	150	115	42	157

COUNTY OF YORK INDUSTRIAL HOME.—*Continued.*

Table shewing the Salaries of Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887. Salary.	1888. Salary.	ALLOWANCES, IF ANY.
	$ c.	$ c.	
Keeper	300 00	300 00	
Matron	175 00	200 00	
Inspector	100 00	100 00	
Physician	175 00	175 00	
Hired Girl	108 00	108 00	
"	96 00	96 00	
Total	954 00	979 00	

Table shewing how many of the Inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

	IMBECILE.			IDIOTIC.			INSANE.			BLIND.			EPILEPTIC.			DEAF & DUMB		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887.	20	12	32	5	1	6	3	5	8	2	4	6	....	1	1	1	....	1
In 1888.	17	15	32	6	4	10	6	4	10	2	2	4	1	1	2	1	....	1
Total	37	27	64	11	5	16	9	9	18	4	6	10	1	2	3	2	....	2

Table shewing period of detention of those committed to the Institution for short periods.

PERIOD OF DETENTION.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
Under 10 days						
10 to 30 days						
30 to 60 "		1	1			
60 to 90 "						
90 days and over						
Total			1			

COUNTY OF YORK INDUSTRIAL HOME.—*Continued,*

Table shewing the number of Committals of Inmates of the Institution to cells or solitary confinement as punishment, and the periods there.

Number, 1887.	Period of Confinement.	Number, 1888.	Period of Confinement.
1	36 hours.	1	2 hours ....
1	3 hours.	1	2 " .....
		1	2 " .....
		1	24 hours, twice.....

Details of dietary issued to Inmates.

Breakfast.

Porridge and milk, bread, syrup, tea, and the women get butter, and the working men meat.

Dinner.

Soup four times per week ; other days, roast meat (fish in lieu some times in winter) potatoes, vegetables, bread and tea.

Supper.

Bread and butter, with either rice, syrup, apple sauce or cheese and tea, with extras for sick inmates at all meals.

Christmas.—Dinner, extras, roast goose.

New Year's.—Dinner, sausage, minced pie and fried cakes.

Easter.—Dinner, eggs, extra.

All are allowed to eat till satisfied.

COUNTY OF LINCOLN INDUSTRIAL HOME.

RETURN by the County of Lincoln of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established	Industrial Home, beginning of 1887.
Where situated?	Township of Grantham, a little over half mile from City of St. Catharines limits.
Is it maintained at the total cost of the Municipality?	Yes, County.
If not, what proportion of the cost is paid from other sources?	
What are these other sources?	
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887?	Males, 28; females, 22; total, 50.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?	Males, 28; females, 24; total, 52.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution?	$14,500 00.
What was the cost of the lands connected with the Institution?	$5,000 00.
What is the extent thereof?	Fifty acres.
How much is under cultivation?	Forty-five acres.
What was the money value of the returns from such cultivated land during 1887?	$1,085 00.
What was the money value of the returns from such cultivated land during 1888?	$1,010 59.
What was the annual money value of the products of the labour of the inmates, if any, during 1887?	$600 00.
What was the annual money value of the products of the labour of the inmates, if any, during 1888?	$600 00.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887?	$2,921 59, or $92 32 per inmate.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888?	$83 63 per inmate.

County of Lincoln Industrial Home.—*Continued.*

Table shewing the supposed cause of the Pauperism of the Inmates of the Institution.

Supposed Cause.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Sickness						
Destitution	26	14	40	11	6	17
Crippled	2	2	4	2	2	4
Mutes		1	1		1	1
Idiotic		1	1			
Destitute Insane		2	2			
Blind		2	2			
Paralysis				1		1
Total	28	22	50	14	9	23

Table shewing the Ages of the Inmates of the Institution.

Ages.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 15 years	3	3	6		2	2
From 15 to 20 years						
20 to 25 years		1	1		1	1
25 to 30 years						
30 to 35 years		1	1			
35 to 40 years		1	1			
40 to 45 years	1	1	2			
45 to 50 years		1	1			
50 to 55 years		1	1			
55 to 60 years				1		1
60 to 65 years	5		5	2	1	3
65 to 70 years	2	2	4	3		3
70 to 75 years	9	3	12	3	1	4
75 to 80 years	3	4	7	3	3	6
80 to 85 years				2		2
85 to 90 years	4	2	6			
Over 90 years	1	2	3		1	1
Total	28	22	50	14	9	23

COUNTY OF LINCOLN INDUSTRIAL HOME.—*Continued.*

Table shewing the Salaries of the Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887, Salary.	1888, Salary.	Allowances, if any.
	$ c.	$ c.	
Keeper	200 00	250 00	
Matron	100 00	150 00	
Physician	100 00	100 00	
Servant Girl	84 00	108 00	
Servant Man	90 00	90 00	
Inspector	100 00	100 00	
Total	674 00	798 00	

Table shewing how many of the Inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

	IMBECILE.			IDIOTIC.			INSANE.			BLIND.			EPILEPTIC.			DEAF AND DUMB.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887	5	5	10	.. .	1	1	....	2	2	....	2	2	....	1	1	....	1	1
In 1888	3	4	7	....	....	...	....	....	....	....	....	....	1	....	1	...	....	....
Total	8	9	17	....	1	1	....	2	2	....	2	2	1	1	2	....	1	1

Table shewing period of Detention of those committed to the Institution for short periods.

PERIOD OF DETENTION	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 10 days	1	.....	1	2	2	4
10 to 30 days	3	2	5	1	.....	1
30 to 60 days	6	4	10	.....	1	1
60 to 90 days	4	.....	4	2	1	3
90 days and over	14	16	30	9	5	14
Total	28	22	50	14	9	23

County of Lincoln Industrial Home.—*Continued.*

Table shewing the number of Committals of Inmates of the Institutions to cells or solitary confinement as punishment, and the periods there.

1887, Number.	Period of Confinement.	1888, Number.	Period of Confinement.
1	Ed. Carey, half day.	1	C. Miller, twice 1 to 3 hours each time.
2	Boys, half hour each.	1	Celia Mason, once 3 or 4 hours.

Details of Dietary issued to the Inmates.

Breakfast:

Porridge and milk, vegetables, bread, and occasionally meat; tea or coffee and molasses.

Dinner:

Meat, two or three kinds of vegetables, sometimes soup, sometimes pudding, pies, bread every day.

Supper:

Vegetables, Johnny cake and molasses, apple sauce, potatoes, bread always.

Summary of Daily Rations:

Bread, meat, butter, oatmeal, tea, cheese, all they want.

D. B. RETTENHOUSE,
Inspector Industrial Home.

THOMAS KEYES,
Treasurer County Lincoln.

COUNTY OF MIDDLESEX HOUSE OF REFUGE.

RETURN by the County of Middlesex of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established	County of Middlesex House of Refuge.
Where situated ?.....	In the Township of Adelaide, near the Town of Strathroy.
Is it maintained at the total cost of the Municipality?	Yes.
If not, what proportion of the cost is paid from other sources ?	*Nil.*
What are these other sources ?.....	*Nil.*
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887?	Males, 85 ; females, 41 ; total, 126.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888 ?	Males, 84 ; females, 43 ; total, 127.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution ?	$28,320 75.
What was the cost of the lands connected with the Institution ?	$3,300 00.
What is the extent thereof ?.....	45 acres.
How much is under cultivation ?.....	25 acres.
What was the money value of the returns from such cultivated land during 1887 ?	$1,048 90.
What was the money value of the returns from such cultivated land during 1888 ?	$936 60.
What was the annual money value of the products of the labour of the inmates, if any, during 1887 ?	$300 00.
What was the annual money value of the products of the labour of the inmates, if any, during 1888 ?	$310 00.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887 ?	$16 13.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888 ?	$15 75.

COUNTY OF MIDDLESEX HOUSE OF REFUGE.—*Continued.*

Table shewing the supposed cause of the pauperism of the Inmates of the Institution.

SUPPOSED CAUSE.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Intemperance of self or husband	38	3	41	41	.....	41
Ill health	13	.....	13	13	.....	13
Old age	8	5	13	8	5	13
Loss of sight	5	1	6	3	1	4
Deaf and dumb	1	.....	1	1	1	2
Death of mother	2	4	6	2	4	6
Husband absconded	.....	3	3	.....	3	3
Loss of property	5	.....	5	5	.....	5
Father absconded	3	6	9	3	6	4
Homeless	2	.....	2	5	10	15
Bodily deformity	1	3	4	1	3	4
Parents dead	.....	4	4	.....	4	4
Born in House of Refuge	2	3	5	2	3	5
Idiocy	.....	3	3	.....	3	3
Total	85	41	126	84	43	127

Table shewing the ages of Inmates of the Institution

AGES.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 15 years	9	12	21	16	12	28
From 15 to 20 years	1	1	2	.....	3	3
20 to 25 "	1	.....	1	.....	1	1
25 to 30 "	.....	2	2	.....	3	3
30 to 35 "	1	5	6	.....	6	6
35 to 40 "	2	4	6	2	4	6
40 to 45 "	1	1	2	.....	1	1
45 to 50 "	.....	3	3	2	4	6
50 to 55 "	5	2	7	3	2	5
55 to 60 "	10	2	12	7	1	8
60 to 65 "	10	1	11	10	1	11
65 to 70 "	10	2	12	8	2	10
70 to 75 "	14	.....	14	14	1	15
75 to 80 "	9	2	11	10	.....	10
80 to 85 "	7	2	9	7	.....	7
85 to 90 "	5	.....	5	4	1	5
Over 90 years	.....	2	2	1	1	2
Total	85	41	126	84	43	127

COUNTY OF MIDDLESEX HOUSE OF REFUGE.—*Continued.*

Table shewing the Salaries of Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887. Salary.	1888. Salary.	Allowances, if any.
	$ c.	$ c.	
Surgeon	200 00	200 00	*Nil.*
Keeper	350 00	350 00	"
Matron	150 00	150 00	"
Engineer	400 00	400 00	"
Inspector	200 00	200 00	"
Total	1,300 00	1,300 00	

Table shewing how many of the Inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

	IMBECILE.			IDIOTIC.			INSANE.			BLIND.			EPILEPTIC.			DEAF & DUMB.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887	5	7	12	....	3	3	1	....	1	6	1	7	1	3	4	1	....	1
In 1888	3	4	7	....	3	3	....	....	....	4	1	5	....	3	3	1	....	1
Total	8	11	19	....	6	6	1	....	1	10	2	12	1	6	7	2	....	2

Table shewing period of detention of those committed to the Institution for short periods.

PERIOD OF DETENTION.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 10 days	.....	.....	.....	.....	.....	*Nil.*
10 to 30 days	.....	.....	.....	.....	.....	"
30 to 60 "	.....	.....	.....	.....	.....	"
60 to 90 "	.....	.....	.....	.....	.....	"
90 days and over	85	41	126	84	43	127
Total	85	41	126	84	43	127

County of Middlesex House of Industry and Refuge.—*Continued.*

Table shewing the number of committals of Inmates of the Institution to cells or solitary confinement as punishment, and the periods there.

Number, 1887.	Period of Confinement.	Number, 1888.	Period of Confinement.
Nil.	*Nil.*	*Nil.*	*Nil.*

Details of dietary issued to the Inmates.

Breakfast:

Bread, porridge, molasses, milk and tea.

Dinner:

Sunday—Bread, roast beef, vegetables and tea.
Monday—Bread, soup, boiled beef, vegetables, tea.
Tuesday—Bread, vegetables and cold meat and tea.
Friday—Bread, fish and vegetables and tea.

Supper:

Bread, rice, milk or syrup and meat to those at work, and occasionally apple sauce.

Summary of Daily Rations:

Bread, $\frac{3}{4}$ lbs. per head daily.
Meat, $\frac{1}{2}$ " "
Butter, $1\frac{1}{4}$ oz. "
Oatmeal, $2\frac{1}{2}$ oz. "
Tea, $\frac{1}{4}$ oz. "

Certified correct to the best of our knowledge and belief.

D. G. MACKENZIE,
County Clerk.

A. M. McEVOY,
County Treasurer.

London, February 27th, 1889.

INDUSTRIAL FARM, COUNTY OF NORFOLK.

Return by the County Treasurer of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established	Industrial Farm, County of Norfolk.
Where situated ?...	On lot 16 and part 17, Gore of Woodhouse.
Is it maintained at the total cost of the Municipality?	Yes—by County of Norfolk.
If not, what proportion of the cost is paid from other sources ?	It is less board, partially paid by 3.
What are these other sources ?.....	Paid for board of three mentioned—$98.00.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887 ?	Males, 47 ; females, 13 ; total 60.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?	Males, 56 ; females, 19 ; total 75.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution ?	$6,450 00.
What was the cost of the lands connected with the Institution ?	$3,000 00.
What is the extent thereof ?.....	100 acres.
How much is under cultivation ?.....	75 acres.
What was the money value of the returns from such cultivated land during 1887 ?	$454 37.
What was the money value of the returns from such cultivated land during 1888 ?	$629 14.
What was the annual money value of the products of the labour of the inmates, if any, during 1887 ?	$454 37.
What was the annual money value of the products of the labour of the inmates, if any, during 1888 ?	$629 14.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887 ?	$38 44.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888 ?	$40 33.

INDUSTRIAL FARM, COUNTY OF NORFOLK.—*Continued.*

Table shewing the supposed cause of the pauperism of the inmates of the Institution.

SUPPOSED CAUSE.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Old Age	25	2	27	28	7	35
Deformed or Disabled	9	3	12	9	3	12
Children	5	7	13	7	4	11
Diseased	5	3	8	10	7	17
Total	44	15	60	54	21	75

Table shewing the ages of the inmates of the Institution.

AGES.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 15 years	5	7	12	7	4	11
From 15 to 20 years	2	2	4	4	2	6
20 " 25 "	1	.....	1	1	2	3
25 " 30 "	.....	.....	.....	1	1	2
30 " 35 "	.....	.....	.....	.....	.....	.....
35 " 40 "	1	2	3	1	2	3
40 " 45 "	4	.....	4	3	.....	3
45 " 50 "	2	.....	2	4	.....	4
50 " 55 "	2	.....	2	1	.....	1
55 " 60 "	2	.....	2	4	.....	4
60 " 65 "	3	.....	3	2	1	3
65 " 70 "	9	.....	9	9	1	1
70 " 75 "	7	.....	7	10	1	11
75 " 80 "	5	1	6	4	4	
80 " 85 "	4	.....	4	5	.....	5
85 " 90 "	.....	1	1	.....	1	1
Over 90 years	.....	.....	.....	.....	.....	.....
Total	47	13	60	56	19	75

INDUSTRIAL FARM, COUNTY OF NORFOLK.—*Continued.*

Table shewing the salaries of Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887. Salary.	1888. Salary.	ALLOWANCES, IF ANY.
	$ c.	$ c.	
Overseer	400 00	400 00	No allowance.
Medical Superintendent	150 00	150 00	
One female assistant	84 00	84 00	
Total	634 00	634 00	

Table shewing how many of the inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

—	IMBECILE.			IDIOTIC.			INSANE.			BLIND.			EPILEPTIC.			DEAF & DUMB		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887	3	2	5	....	....	....	....	....	....	3	....	3	1	....	1	....	....	...
In 1888	3	2	5	....	....	....	....	1	1	3	....	3	1	1	2	....	....	....
Total	6	4	10	....	....	....	....	1	1	6	....	6	2	1	3	....	....	....

Table shewing period of detention of those committed to the Institution for short periods.

*PERIOD OF DETENTION.	1887.			1888.		
	Males.	Females.	Total.	Males.	Females.	Total.
Under 10 days	.....	.....	.....	.....	.....	.....
10 to 30 days	.....	.....	.....	.....	.....	.....
30 to 60 days	.....	.....	.....	.....	.....	.....
60 to 90 days	.....	.....	.....	.....	.....	.....
90 days and over	.....	.....	.....	.....	.....	.....
Total	.....	.....	.....	.....	.....	.....

*Not committed for any definite period.

INDUSTRIAL FARM, COUNTY OF NORFOLK.—*Continued.*

Table shewing the number of committals of inmates of the Institutions to cells or solitary confinement as punishment, and the periods there.

Number, 1887.	Period of Confinement.	Number, 1888.	Period of Confinement.
	We have no place of confinement in the home.		

Details of Dietary issued to the inmates.

Breakfast :

One pint porridge, one pint milk, 4 oz. bread, half-pint tea.

Dinner :

Four ounces bread, half pound meat, potatoes, pudding or pie, half pint tea.

Supper :

Six ounces bread, one ounce butter, rice or apple sauce, half pint tea.

Summary of Daily Rations.

Bread, 14 oz. per head daily. Cheese, *nil.*

Meat, ½ lb. " "

Butter, 1 oz. " "

Oatmeal, 1 pint " "

Tea, as above stated.

The above tables filled in by Medical Superintendent of Poor House or Industrial Farm.

T. W. WALSH,
County Treasurer.

COUNTY OF WELLINGTON HOUSE OF INDUSTRY AND REFUGE.

Return by the Inspector of County Wellington House of Industry, of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established	County of Wellington House of Industry and Refuge, established in 1878.
Where situated?.....	In the Township of Nichol, midway between the villages of Fergus and Elora.
Is it maintained at the total cost of the Municipality?	Almost.
If not, what proportion of the cost is paid from other sources ?	Very small.
What are these other sources?.....	From inmates who pay something on account of their maintenance.
How many persons were permanently or temporarily lodged during the year ending 1st Dec., 1887? *	The average was 64.60-100 during the year. There were 39 males and 29 females in the House at the close of the year.
How many persons were permanently or temporarily lodged during the year ending 1st Dec., 1888? *	The average was 77.7-100 during the year. There were 43 males and 34 females in the House at the close of the year.
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution ?	The total amount expended on buildings and grounds up to the 1st December, 1888, was $29,390.75. The expenditure on these heads is all charged to one account.
What was the cost of the lands connected with the Institution ?	The original cost of land was $2,900, but a good deal has been expended from time to time on improvements.
What is the extent thereof?.....	About 58 acres.
How much is under cultivation?.....	About 30 acres.
What was the money value of the returns from such cultivated land during 1887 ?	No correct account has been kept of the produce of the farm and garden consumed by the inmates of the House and the live stock on the farm.
What was the money value of the returns from such cultivated land during 1888 ?	Same answer as above.
What was the annual money value of the products of the labour of the inmates, if any, during 1887 ?.	No estimate has been made, and it would be very hard to furnish any that would be reliable. Many do nothing and others do so very little.
What was the annual money value of the products of the labour of the inmates, if any, during 1888?	Same as above.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887 ?	$73.79.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888 ?	$63.97.

* Our financial year ends 1st December.

County of Wellington House of Industry and Refuge.—*Continued.*

Table shewing the supposed cause of the pauperism of the Inmates of the Institution.

Supposed Cause.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
The cause of pauperism varies every year, and is often incorrect in the commitment. The chief causes are old age, destitution, imbecility, paralysis, idiotic, epileptic, deaf and dumb, blind, etc.						

Table shewing the ages of the Inmates of the Institution.

Ages.	1887.			1888.		
	Males.	Females	Total.	Males.	Females	Total.
Under 15 years	12	7	19	11	12	23
From 15 to 20 years	...	...	...	1	1	1
20 to 25 "	1	7	8	1	9	10
25 to 30 "	1	6	7	2	3	5
30 to 35 "	...	...	...	...	2	2
35 to 40 "	...	2	2	1	1	2
40 to 45 "	...	...	...	...	...	...
45 to 50 "	3	1	4	4	1	5
50 to 55 "	1	...	1	1	1	2
55 to 60 "	2	...	2	4	...	4
60 to 65 "	5	2	7	2	2	4
65 to 70 "	7	1	7	9	4	13
70 to 75 "	7	4	11	8	2	10
75 to 80 "	5	1	6	10	1	11
80 to 85 "	7	...	7	10	2	12
85 to 90 "	5	3	8	4	...	4
Over 90 years	1	...	1	2	1	3
Total	57	33	90	69	42	111

COUNTY OF WELLINGTON HOUSE OF INDUSTRY AND REFUGE.—*Continued.*

Table shewing the salaries of Attendants, Surgeons and the Officials of the Institution.

POSITION.	1887. Salary.	1888. Salary.	ALLOWANCES, IF ANY.
	$ c.	$ c.	
Keeper	300 00	300 00	
Matron	200 00	200 00	
Physician	150 00	150 00	
Inspector	100 00	100 00	
Hired help	568 28	488 50	
Total	1318 28	1238 50	

Table shewing how many of the Inmates of the Institution were regarded as imbecile, Idiotic or insane, and how many were blind, epileptic and deaf and dumb.

	IMBECILE.			IDIOTIC			INSANE.			BLIND.			EPILEPTIC.			DEAF & DUMB		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1887*	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
In 1888	22	13	35	....	....	....	....	....	....	4	1	5	3	1	4	....	....	....
Total	22	13	35	....	....	....	....	....	....	4	1	5	3	1	4	....	....	....

*Have no current data for 1887.

Table shewing period of detention of those committed to the Institution for short periods.

PERIOD OF DETENTION.	1887. Males.	Females	Total.	1888. Males.	Females	Total.
Under 10 days	None are committed for definite periods. They are kept until death or discharged on the order of the Reeve, or by Reeve who signed the Commitment, or discharged by resolution of the Standing Committee.					
10 to 30 days						
30 to 60 "						
60 to 90 "						
90 days and over						
Total						

COUNTY OF WELLINGTON HOUSE OF INDUSTRY AND REFUGE.—*Continued.*

Table shewing the number of committals of Inmates of the Institution to cells or solitary confinement as punishment, and the periods there.

Number, 1887.	Period of Confinement.	Number, 1888.	Period of Confinement.

It has not been found necessary to commit many to cells or solitary confinement, and the few who have been committed have been kept only a few hours.

Details of dietary issued to the Inmates.

Breakfast :

Porridge and milk, bread and tea.
The sick and infirm are allowed extras—butter and sometimes meat or fish.

Dinner :

Soup, meat, vegetables and bread. On Sundays, etc., meat with hot potatoes and pickles, coffee.
The sick extras.

Supper :

Bread and butter or bread and syrup with tea.
The sick extras.

Summary of Daily Rations :

Bread, 12.4-100 oz. per head daily.
Meat, 8.88-100 oz. " "
Butter—most of the butter made on the premises and no record kept.
Oatmeal, 1½ oz. per head daily.
Tea—Cannot make a correct estimate. We knew the value of provisions and groceries, etc., on hand at the commencement of the year and also at the close, but not the quantity of tea separately. This can be ascertained in future.

THOMAS BEATTON,
Inspector,
Fergus P.O.

HOUSE OF INDUSTRY, WELLAND.

Return by the House of Industry, Welland, of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established?	House of Industry, opened 11th June, 1888.
Where situated?	Township of Thorold.
Is it maintained at the total cost of the Municipality?	Of County of Welland.
If not, what proportion of the cost is paid from other sources?	
What are these other sources?.....	
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?	Males, ; females, ; total
What amount has been expended upon the erection and improvement of buildings since the establishment of the Institution?	$1,543 00.
What was the cost of the lands connected with the Institution?	60 acres—$3,600 00,
What is the extent thereof?	60 acres.
How much is under cultivation?	All.
What was the money value of the returns from such cultivated land during 1888?	
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, and interest on invested capital, in 1888?	$2 31½ per week.

Table shewing the supposed cause of the pauperism of the inmates of the Institution.

Supposed Cause.	1888.		
	Males.	Females.	Total.
The inmates are those previously kept by the County as the Insane Destitute.	....	....	.....

HOUSE OF INDUSTRY, WELLAND.—*Continued.*

Table shewing the ages of the Inmates of the Institution.

AGES.	1888.		
	Males.	Females.	Total.
Under 15 years	2	1	3
From 15 to 20 years		1	1
20 " 25 "	2	1	3
25 " 30 "	1	1	2
30 " 35 "	1		1
35 " 40 "	2	1	3
40 " 45 "	2		2
45 " 50 "	2	1	3
50 " 55 "	2		2
55 " 60 "	3	1	4
60 " 65 "	5	1	6
65 " 70 "	6	4	10
70 " 75 "	9	2	11
75 " 80 "	3		3
80 " 85 "	2		2
85 " 90 "	2	1	3
Over 90 years			
Total	44	15	59

Table shewing the Salaries of Attendants, Surgeons and Officials of the Institution.

POSITION.	1888. Salary per year.	ALLOWANCES, IF ANY.
	$	
Keepers	300 00	
Matron	100 00	
Physician	100 00	
Inspector	100 00	
Farm hands	680 00	
Two servant girls	208 00	$2 per week each.

HOUSE OF INDUSTRY, WELLAND.—*Continued.*

Table shewing how many of the Inmates of the Institution were regarded as imbecile, idiotic or insane, and how many were blind, epileptic and deaf and dumb.

	Imbecile.			Idiotic.			Insane.			Blind.			Epileptic.			Deaf & Dumb.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
In 1888																		
Total																		

Table shewing period of detention of those committed to the Institution for short periods

Period of Detention.	1888.		
	Males.	Females.	Total.
Under 10 days			
10 to 30 days			
30 to 60 days			
60 to 90 days			
90 days and over			
Total			

Table shewing the number of committals of Inmates of the Institutions to cells or solitary confinement as punishment, and the periods there.

Number, 1888.	Period of Confinement.
1	16 Hours.
1	6 "
1	6 "

HOUSE OF INDUSTRY, WELLAND.—*Continued.*

Details of Dietary issued to the inmates.

Breakfast:

Oatmeal, bread and butter, coffee.

Dinner:

Beef, potatoes, bread, tea.

Supper:

Bread and butter, or cheese, tea.

Summary of Daily Rations:

Bread, 1½ lbs. per head daily.
Meat, 1 lb. " "
Butter, 2 oz. or cheese.
Oatmeal, all they want.
Tea, ¼ oz.

COUNTY OF BRANT HOUSE OF REFUGE.

TREASURER'S OFFICE, COUNTY OF BRANT,
BRANTFORD, ONT., 5th March, 1889.

R. CHRISTIE, Esq.,
Inspector of Prisons, etc., Toronto.

DEAR SIR,—In reply to your circular of the 16th February (only received by me this day), *re* House of Refuge, I beg to say that our Institution, the erection of which was commenced in April, 1888, and completed about the 1st of January, 1889, we have expended the following amount of money :—

House with good accommodation for the Overseer and Matron, with their family, and sixty inmates, cost	$11,530 00
Barn, with basement, cellar and stables	1,340 00
Furniture, etc., in the House	860 00
Live stock and implements	600 00
Forty-five acres of land in the farm work	5,000 00
Total cost of buildings, land and furnishings	$19,330 00

The city of Brantford and the townships of Brantford and Oakland entered into an agreement to purchase a farm and erect on it suitable buildings, etc., for a House of Refuge, and each municipality to pay their proportion of the expenses of the buildings and purchase of land on a *basis* of population, each municipality to pay for the maintenance according to the number that they send to the Institution. Mr. Cockshutt gave to the above mentioned Institutions $5,000, and the late Mr. Humphery Davis gave $5,000, and about the first of January of the present year Mr. J. Cockshutt gave a further grant of $10,000 on condition that the whole county of Brant should be admitted to share with the city of Brantford and townships of Brantford and Oakland in all of the above mentioned grants. The county and city now owns the farm with the buildings and all connected therewith, which has cost about $20,000. On account of the liberal grants made by J. Cockshutt, Esq., and the late Humphrey Davis the county and city have not had to pay out one cent of their own money so far. The city and county are to pay on a basis of population for all salaries, furniture, clothing, fuel, and permanent improvements, and for the maintenance, according to the number of each different municipality may send to the House. The Overseer and Matron were appointed in 1888, and are paid $350 a year as salary. There is a Surgeon and an Inspector, but the salary is not yet named for the latter officers. The House is comfortable and convenient, heated by steam, and in every respect a good home for the unfortunate persons who require such care. There is no regular cast-iron rules as to details of dietary, etc., good wholesome food is provided and varied according to requirements and tastes, etc.

Our first inmates were admitted about the 10th of January last.

I have perhaps written more than is of any interest to you, but it did not seem to me that the Brantford Institution was one of those that the questions asked in Parliament applied to, or that in any way came under the head of your circular, etc., as it has not been in operation two months yet. If I knew when you would be in the city visiting the Blind Institute I would be pleased to drive you over to our Institution, which is about one mile from the Market Square in the opposite direction from the said Blind Institute.

Your obedient servant,

W. S. CAMPBELL.

COUNTY OF BRANT HOUSE OF REFUGE—*Continued.*

R. CHRISTIE, ESQ.,
Inspector of Prisons, etc., Toronto.

DEAR SIR,—Since I wrote you yesterday the enclosed return was laid on my desk by our overseer, filled out by him, I suppose. If there is anything further required in the shape of returns I will be happy to furnish the same. I was not aware that there was a blank return furnished or I should not have troubled you with so long a letter yesterday.

Your obedient servant,

W. S. CAMPBELL.

COUNTY OF BRANT HOUSE OF REFUGE—*Continued.*

Return by the House of Refuge of the County of Brant of information ordered by the Legislative Assembly of Ontario, Session of 1889.

Name of Institution and date established.	House of Refuge, 1888.
Where situated?.....	In the Township of Brantford.
Is it maintained at the total cost of the Municipality?	By the County and City.
If not, what proportion of the cost is paid from other sources?	
What are those other sources?.....	City and County for a portion, or else fixed expense, Townships for the food supplies.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1887?	None.
How many persons were permanently or temporarily lodged during the year ending 31st December, 1888?	None.
What amount has been expended upon the erection and improvement of building since the establishment of the Institution?	None.
What was the cost of the lands connected with the Institution?	Gift, but worth $5,000.
What is the extent thereof?.....	Fifty acres.
How much is under cultivation?.....	Just got it, about 35 acres.
What was the money value of the returns from such cultivated land during 1887?	None.
What was the money value of the returns from such cultivated land during 1888?	About $600 00.
What was the annual money value of the products of the labour of the inmates, if any, during 1887?	None.
What was the annual money value of the products of the labour of the inmates, if any, during 1888?	None.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1887?	None, only a portion of year's salary to Overseer.
What was the annual cost per head for maintenance in the Institution, including the cost of salaries and wages, but excluding interest on invested capital, in 1888?	Had no inmates till January, 1889.

RETURN

To an order of the Legislative Assembly, passed on the 1st day of March, 1889, for a Return shewing the number of persons who have visited the Queen Victoria Niagara Falls Park during the year 1888. Also shewing the number who have paid for admission to the islands in the Park, giving the amount of revenue derived from that source. Also shewing the amount of revenue derived from all other sources during the year; also the amount paid as expenses for the management of the Park, giving the names of the officials and the amount paid to each. Also giving a statement of the money still on hand derived from the sale of bonds, and shewing the amount of interest paid and from what source paid, so far as these particulars do not appear in the Report of the Commissioners.

J. M. GIBSON,
Secretary.

Provincial Secretary's Office,
Toronto, March, 19th, 1889.

(*Mr. Morin.*)

RETURN

Respecting the Queen Victoria Niagara Falls Park, shewing the number of visitors in 1888, number who paid for admission to the Islands and revenue derived therefrom, and from all other sources; the expense of management, etc., the names and salaries of officials, and other particulars not set forth in the Report of the Commissioners.

Total number of visitors to the Park from 24th May to 31st December, 1888	213,874
Number of visitors who paid for admission to the Islands in this period	13,055
Amount of revenue derived from visitors to the Islands	$1,698 07
Amount of revenue from all other sources, during 1888	$8,263 27
Amount paid as expenses, including cost of management, new works and improvements in 1888	$25,920 37
Amount paid for one year's interest on bonds	$21,000 00
Bank commission on coupons	$61 66
Cash in Imperial Bank, December 31st, 1888	$45,802 91

List of Officials engaged at the Park with Amount paid to Each.

James Wilson, C. E., Superintendent	$2,000 per year, and house.
James Quillinam, Accountant	$800 "
Roderick Cameron, Gardener	$600 "
William Bowman, Policeman	$2 per day and official clothing.

Gate Keepers.

James Willox	$1 50	per day, free house and official suits.
Walter Waite	$1 50	
Wilas W. Whistler	$1 50	
Joseph Wynn	$1 50	
Thomas Wilson	$1 50	

Toronto, March, 1889.

(No. 63.)

Return, shewing the amount received from Poll Tax in each City, Town and Village in the Province for the year 1886. (*Not printed.*)

RETURN

Shewing the Printing Paper Contract between Her Majesty and William Barber & Brothers.

Presented by Command,

J. M. GIBSON,

Secretary.

Provincial Secretary's Office,
Toronto, 20th March, 1889.

PRINTING PAPER CONTRACT.

THIS AGREEMENT, made on the first day of January, in the year of our Lord one thousand eight hundred and eighty-nine, between John R. Barber, of the Village of Georgetown, in the County of Halton, Merchant, trading under the name and style of William Barber and Brothers, of the first part, and Her Majesty the Queen of the second part:

WITNESSETH, that the said party of the first part has agreed and does hereby agree with Her Majesty the Queen (represented in this behalf by the Government of the Province of Ontario) and Her Successors, to furnish all the supply of printing papers required by the said Government of the Province of Ontario, of the kinds mentioned in the annexed specifications, at the places and at the times and within the periods, and upon the terms and conditions therein specified, for and during the space and term of five years to be computed from the said first day of January, one thousand eight hundred and eighty-nine, and to be paid for at the rates and at the times also set forth in the said specifications..

And the said party of the first part agrees in all things to conform, to fulfil and to abide by the said specifications to the full and entire satisfaction of the Queen's Printer of Ontario for the time being.

It is hereby further agreed that this contract is subject to ratification by vote of the Legislative Assembly of Ontario, and that the same and everything therein contained shall become void and of no effect unless the same be approved by resolution of the Legislative Assembly of Ontario at its next Session.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written, and the Lieutenant-Governor of Ontario has also executed the same under the seal of the said Province.

Signed, sealed and delivered in the presence of } JOHN R. BARBER. [Seal.]
J. LONSDALE CAPREOL. }

Know all men by these presents, that we Edward Trout, of the City of Toronto, Publisher, and John F. Ellis, of the same place, merchant, are severally held and firmly bound to our Sovereign Lady the Queen and Her successors, each in the separate sum of one thousand dollars of lawful money of Canada, to be paid unto Her Majesty the Queen and Her successors, for which several payments well and truly to be made to Her Majesty, we each bind ourselves, (each for his own sum and not for each other) our several heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated the first day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas, John R. Barber, of the Village of Georgetown, aforesaid, trading under the name and style of William Barber & Brothers, has contracted to furnish the Government of Ontario with printing papers in accordance with the terms of the agreement and specifications hereunto annexed.

Now, the conditions of this obligation are such, that if the said John R. Barber shall well and truly perform the said contract, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed, sealed and delivered in the presence of } Edward Trout, [Seal.]
J. Lonsdale Capréol. } Jno. F. Ellis. [Seal.]

Report from Queen's Printer to the Honourable the Treasurer of Ontario, upon the samples of printing paper submitted with tenders.

Sir,—I have examined carefully every sample of paper submitted as to quality of stock, cleanness and price.

William Barber & Bros., have sent in a complete set of samples in triplicate, and consisting of six different qualities, four in Double Royal, and two in Quad Cap.

Their sample B, at four dollars per ream, would fill the requirement very well for Double Royal, while their sample A, in Quadruple Foolscap at three dollars and twenty cents per ream would also be suitable and satisfactory.

Wm. Creighton sent three qualities, two in Double Royal and one in Quad Cap.

His sample A, No. 2, in Double Royal is good, while the price at four dollars per ream is the same as that of William Barber & Bros. His sample of A, No. 2, in Quad Cap is good also, but his price at three dollars and thirty-three and a half cents per ream is thirteen and a half cents per ream more than that of William Barber & Bros., and no more suitable for the purpose.

The Canada Paper Company sent in two samples in duplicate, one of Double Royal, and one of Quad Cap. Their sample B in Double Royal, at three dollars and seventy-four cents per ream, is the only one to select from, and is not equal to the requirement, in regard to quality; the same may be said of their Quad Cap at three dollars and two cents per ream, and I would not like to use either of them.

Appended to this, is an exhibit shewing the particulars here referred to, and from which it will be seen, that sample B, Double Royal, 27x41, 55lbs., at four dollars per ream, and sample A, Quadruple Foolscap, at three dollars and twenty cents per ream, and both so tendered for by William Barber & Bros., would seem the most desirable contract.

Your obedient servant,

(Sgd.) John Notman,

Queen's Printer for Ontario.

27th *November*, 1888.

EXHIBIT IN *re* TENDERS for Papers to be contracted for from January, 1889, to January, 1894.

Sample.	Approximate quantity of Double Royal required.	Approximate quantity of Quad. Cap. required.	Tenderers who have competed.	Price per Ream.	Total amount in Five Years.
A	12,500 reams	2,000 reams	Wm. Barber Bros	$4 25	$53,125 00
B	"	"	"	4 00	50,000 00
C	"		"	3 80	47,500 00
D	"		"	3 65	45,625 00
A		2,000 reams	"	3 20	6,400 00
B		"	"	2 95	5,900 00
B	12,500 reams		Canada Paper Co	3 74	46,750 00
A		2,000 reams	"	3 02	6,040 00
A 1	12,500 reams		Wm. Creighton	4 26	53,250 00
A 2	"		"	4 00	50,000 00
A 2		2,000 reams	"	3 33½	6,670 00

(Signed) JOHN NOTMAN,
Queen's Printer for Ontario.

SPECIFICATIONS for printing papers required by the Government of Ontario during the next consecutive five years, and commencing with the first day of January, 1889.

The papers required will be Double Royal and Quadruple Foolscap.

Double Royal must be number one in quality, 27 inches by 41 inches in size, have 500 sheets to the ream, of the full scale weight of 55 lbs. to the ream, white, in the flat, and made up in bundles of two reams to each bundle, entirely covered with strong wrapping paper, securely tied with strong twine and be of the full weight of 110 lbs. irrespective of the wrappings.

Quadruple Foolscap must be number two in quality, 25½ inches by 30 inches in size, have 500 sheets to the ream, of the full scale weight of 46 lbs. to the ream, white, in the flat, and made up in bundles of two reams to each bundle, entirely covered with strong wrapping paper, securely tied with strong twine and be of the full weight of 92 lbs. irrespective of the wrappings.

The papers are to be furnished at such times and in such quantities as may be required by the Queen's Printer, and delivered to, or for, him at such place or places in the City of Toronto as he shall from time to time designate, free from all charges for freight, and within two weeks after notice of requirement. Payment therefor to be made by cheque from the Treasury Department within thirty days after delivery.

Should the Contractor be at any time backward in delivering the papers, the right is reserved to have the same procured elsewhere, deducting from the account the difference, if any, in the cost.

The Contractor to be subject to the decision of the Queen's Printer on all points.

Any dispute that may arise may be investigated and finally determined by the Executive Council of Ontario.

The Department is not bound to accept the lowest or any tender.

Sealed tenders, with samples of paper and prices, to be sent to the Hon. A. M. Ross, Provincial Treasurer, Toronto, till noon of November the 10th, 1888.

TORONTO, *28th November, 1888.*

The undersigned begs to submit the report of Mr. Notman, Queen's Printer, upon the tenders received for printing papers, and in accordance with Mr. Notman's report, begs to recommend that the tender of Messrs. William Barber and Brothers for sample "B" (Double Royal) at four dollars ($4.00) per ream, and sample "A" (Quadruple Foolscap) at three dollars and twenty cents ($3.20) per ream be accepted.

A. M. Ross.
Provincial Treasursr.

COPY of an Order in Council approved by His Honour the Lieutentant-Governor, the 30th day of November, A.D. 1888.

Upon consideration of the report of the Queen's Printer, dated 27th November, 1888, and upon the recommendation of the Honourable the Treasurer, the Committee of Council advise that the tender of William Barber & Brothers, for the supply of printing papers required by the Government, be accepted, such tender being as follows, namely :—

For sample "B" (Double Royal) per ream.....	$4 00
For sample "A" (Quadruple Foolscap) per ream.....	3 20

(Certified) J. LONSDALE CAPREOL,
Asst. Clerk Executive Council.
Ontario.

JOHN NOTMAN, ESQ.,
Queen's Printer.

COPY

Of an Order of His Honour the Lieutenant-Governor in Council, approved the 18th March, 1889, respecting the sum to be paid to Mr. S. Malcolmson, as Deputy Registrar of the Chancery Division of the High Court of Justice, and appointing him to that office in the room and stead of Henry McDermott, deceased.

Presented to the Legislative Assembly.

By Command,

J. M. GIBSON,
Secretary.

Provincial Secretary's Office,
Toronto, 19th March, 1889.

COPY

OF AN ORDER IN COUNCIL APPROVED BY HIS HONOUR THE LIEUTENANT-GOVERNOR, DATED THE 18TH DAY OF MARCH, A. D. 1889.

Having reference to the Order in Council, of 5th May, 1882, commuting the fees of the offices of Local Master and Deputy Registrar, at Goderich, of the Chancery Division of the High Court of Justice, at the sum of $2,500, and directing, that of the said commutation, the sum of $1,250 per annum be paid to Mr. Henry McDermott, as Local Master and Deputy Registrar, and $1,250 to Mr. Sutherland Malcolmson as Local Master, and that the said commutation should terminate upon the death of either of the said Masters, and to the fact, that the said Henry McDermott has recently departed this life, and upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that Mr. Malcolmson be appointed Deputy Registrar of the Chancery Division of the High Court of Justice, in the room and stead of the said Henry McDermott, deceased, and that the said sum of $1,250 per annum be continued to be paid to him as the commutation of the fees of his said offices of Local Master and Deputy Registrar.

Certified,

J. LONSDALE CAPRÉOL,
Assistant Clerk Executive Council,
Ontario.

(No. 66.)

Return, shewing the amount paid by the Province and the rates charged per thousand gallons by the City of Toronto during each of the past five years for water supplied to the Public Institutions and Departmental Buildings, and offices of this Province located in the City. (*Not printed.*)

BINDING SECT. AUG 23 1967